PETITION FOR CERTIORARI.

IN THE SUPREME COURT OF THE UNITED STATES.

SOUTHERN RAILWAY COMPANY,
Petitioner,
vs.
INEZ KING, by next friend,
Respondent.

To the HONORABLE The CHIEF JUSTICE and ASSOCIATE JUSTICES of THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner the SOUTHERN RAILWAY COMPANY, respectfully represents that INEZ KING, by next friend, brought her suit in Habersham Superior Court against the SOUTHERN RAILWAY COMPANY for the alleged personal injury she received at a public crossing. Said case was regularly removed into the United States Circuit Court for the Eastern Division of the Northern District of Georgia. In addition to the general answer filed, your petitioner filed an amended answer under the order of the Court in words as follows:

(Answer on page 28 of the Record, 635).

"Now comes the Southern Railway Company, the defendant in the above stated case, and by permission of the Court first obtained, amends its answer already filed, and says plaintiff should not recover in this case, for the following additional reasons:

PARAGRAPH XI.

At the time plaintiff alleges she was injured and for many years prior thereto, and now, defendant controls and operates a line of railroad from the City of Washington, D. C., through the States of Virgnia, North Carolina, South Carolina, and into

and through Georgia; said line forming a continuous line of railroad, the same having been formed under the Act of Congress, for the purpose of facilitating commerce among the several states, and the postal and military communications of the United States, and to that end for the purpose of carrying passengers, freight, government mails, troops and supplies from one state into another.

PARAGRAPH XII.

Defendant further shows that the train which plaintiff alleges injured her was a through train made up in the City of Washington, D. C., carrying U. S. Mail, and an express car of merchandise, and passenger coaches with passengers going from one state into another; and this defendant by said train was doing an inter-state business, under the authority and control of the Congress of the United States.

PARAGRAPH XIII.

Defendant further shows that the statute of Georgia, which is in these words, to-wit:

"There must be fixed on the line of said road, at the distance of 400 yards from the center of each of said crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof so as to stop in time should any person or thing be crossing said track on said road," the violation of which plaintiff alleges as the negligence in this case is and was inopperative as to defendant's train, which plaintiff alleges injured her, for the reason that it is in violation of Section 8, Article First, of the Constitution of the U. S., which gives to Congress the right to

"regulate commerce with foreign nations, and among the several states and with the Indian Tribes."

PARAGRAPH XIV.

Your defendant further shows that the Statute of Georgia is not a reasonable regulation of the police power of the state to secure the safety of persons, but that the statute is a direct burden on and impedes the inter-state traffic being done by this defendant, and impairs the usefulness of its facilities for such traffic.

PARAGRAPH XV.

Defendant further shows that it is impossible to observe said statute and carry the mails as defendant is required to carry them under the contract it has with the government; and it is likewise impossible to do an inter-state business, and at the same time comply with the terms of said statute.

Wherefore, it says that said statute is inoperative as to it, and it should not be required to comply with the same on its inter-state line of railroad.

All which it stands ready to verify and prays that it be hence discharged with its reasonable cost."

The plaintiff below demurred to this amendment upon the ground that the same did not set up a defense good in law. After argument the Hon. W. T. NEWMAN, Judge, presiding, sustained the demurrer and struck the amendment. The case then went to trial.

During the progress of the case Ben Dewberry, an Engineer of the Company was a witness on the stand and the following occurred:

"BEN DEWBERRY, stated that:

"There are between ninety and one-hundred crossings on the

Southern Railway, between the South Carolina line and Atlanta."

"Plaintiff's counsel said:

'I object to that question and to the answer, because incompetent, immaterial and inadmissible. I think the entire case should be confined to this crossing.'

"Counsel for defendant then stated:

'I expect to prove that between the South Carolina line and Atlanta, there are practically one-hundred road crossings, or between eighty-five and one-hundred public road crossings; that the distance is one-hundred and one miles; that the crossings in some localities are very close together, and within a few hundred yards of each other, and at others farther apart, but on the average making a crossing to the mile almost. We expect to show further, that to observe the statute and check and keep checking so as to have a train under control, and to stop should any person or thing be on the crossing it would consume from five to ten minutes for each crossing dependent, of course, upon the weight and length of the train, and the grade; but it would make an average of seven or eight minutes. We wish to show that this train was made up and known as No. 39, the vestibule train which runs from the City of Washington, through the States of Virginia, North Carolina, South Carolina and Georgia; that it was carrying passengers from one state to another, also carrying an express car with freight on it, from one state to another. We wish and expect to show that obedience to that Crossing Act would hinder, and practically prevent inter-state business being done by the defendant railroad. We wish to show the condition I have just stated all existed at the time this accident occurred, on the 11th of October, 1903.'"

"By the Court:

'The testimony will be excluded, and you may have an exception noted to this ruling.'"

A verdict was rendered for the plaintiff below. Motion for New Trial was made and overruled, and the case then carried to the United States Circuit Court of Appeals, being No. 1635 of the Fifth Circuit.

On the 3d day of March, 1908, the United States Circuit Court of Appeals handed down an opinion affirming the judgment of the Court below; all of the Justices of said Court agreeing upon all the propositions in the case, except the demurrer to the amended answer above set forth, and as to this proposition two of the Justices only assenting to the opinion, the other expressing a different view. A copy of said opinion as rendered is as follows:

UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT.

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error.
vs.
MRS. JOSEPHINE KING,
Defendant in Error.
No. 1634.

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error.
vs.
INEZ KING, by next friend,
Defendant in Error
No. 1635.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

Before Judges Pardee and Shelby, Circuit Judge, Burns, District Judge. Burns, District Judge delivered the opinion.

These suits were brought in the Superior Court of Habersham County, State of Georgia against the Southern Railway Company and were removed by the latter to the United States Circuit Court.

Mrs. King sought recovery for the death of her husband, and Inez, a minor, sued by next friend for personal injuries which she had sustained.

The grounds of negligence set out in both petitions are practically the same. Mrs. King alleging that on the day of the accident, "Your petitioner, her daughter, Inez, about 14 years old and her husband A. O. King, were in a buggy drawn by a mule, traveling on a public road, and while crossing the track of said railway at what is known as the 'Wade crossing'

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the vehicle was struck by the locomotive. That in the approach to said crossing the track was obscured by trees, brushes and a high bank; that the approaching train was not discovered until they were upon the track; that the speed of the train was fifty miles an hour; that the death of A. O. King and the injuries received by petitioners were due to the negligent manner in which the train was operated, the high rate of speed and failure to give any warning. The petitions further aver that "the defendants' agent failed to blow the whistle at the blow-post; and failed to simultaneously check and keep checking the speed of said train as it approached said crossing, so as to stop in time, should any person or thing be crossing said track."

The defendant, the Railway Company filed its answer denying each and every paragraph of plaintiff's petition and thereafter with leave of court pleaded by amendment that at the time of the accident for many years prior thereto and now the defendant operates and controls a line of railway from the City of Washington, D. C., through the States of Virginia, North and South Carolina, into and through Georgia; that said railway forms a continuous line under the Act of Congress, for the purpose of facilitating commerce among the several States, and the postal and military communications of the United States, and to that end for the purpose of carrying passengers, freight, mails, troops and supplies from one State into another. That said train was a through train made up in the City of Washington, carrying mail, express and passengers from one State into another, and doing an inter-state business, under the authority and control of the Congress of the United States. That the Statue of Georgia, providing that "there must

be fixed on the line of said road, at the distance of 400 yards from the center of each of said crosings and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts to blow the whistle of the locomotive until it arrives at the public crossing, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road," is inoperative as to defendants trains, for that, it is in violation of Sec. 8, Article 1 of the Constitution of the United States, which gives to congress the right to "regulate commerce with foreign nations and among the several States." That said statute is not a reasonable regulation of the police power, but a direct burden upon and impediment to inter-state traffic and impairs the usefulness of defendant for the conduct of such business. That it is impossible to observe said statute and carry the mails under the contract which defendant has with the Government, and the observance of said statute renders it impossible to do an inter-state business.

Mrs. King about the same time, filed suit in Habersham County seeking compensation for the injuries to her person and the amount claimed as damages not being within the purisdiction of the said Federal Court, trial was had in the Superior Court of said County, resulting in a verdict for one thousand dollars. On appeal the judgment was affirmed by the Supreme Court of the State of Georgia. (See King vs. Ry. Co., Vol. 55 R. R. page 965: 128 Ga. p. 383. Upon motion and agree ment of counsel, an order was entered consolidating the two causes of the mother and daughter, resulting in verdicts for the plaintiffs below, from which, and the judgments thereon, assignments of error are presented for review.

The records are identicl in both cases with the exception that the Railway Company filed in the trial court a plea in bar, against the petition of Mrs. King upon the ground that plaintiff having recovered in the State court for damages to her person, is now estopped from maintaining the present action for the death of her husband. The contention is made that the injuries to the person of the wife, and the loss occasioned by the death of the husband, constitute a single cause of action and that separate actions will not lie. This contention appears to be seriously made but in the practice and procedure of the several State it would appear to be a legal novelty without law or precedent. If it be conceded that the deceasd husband was the "person property"' of the plaintiff herein, then the contention would be supported by the decisions of every State court, but one.

Where injuries to the person and the physical property of the injured party, grow out of a single tort, then, and in that event, the tort to the person and the property constitutes a single cause of action, and as previously suggested, the same should be presented in a single suit. This is the English view and the holding is the same in all the American Courts with one exception. The declaration that the husband is the "personal property" of the wife had not, as yet, received the sanction of court or text writer. The rule as to a single cause of action has no application where the injury is suffered in a different capacity, or by different persons. In such cases there is, of necessity, two causes of action and when embraced in a a single suit, a plea of misjoinder would be applicable. Damages recovered by the surviving wife for injuries to her person became her separate property. Whereas in many States, and

especially in Georgia, the recovery for the death of the husband becomes a trust fund for the benefit of the heirs of the deceased.

It follows, that the error complained of, by reason of the court overruling said plea, is without merit. Any other disposition would have been error.

The following instruction is assigned as error:

"I further charge you that the care to be exercised by the said A. O. King in approaching the crossing and railroad track is that care which an ordinarily prudent person would exercise for his own safety. What would, or would not, amount to negligence in the manner upon which a person entered upon a railroad track, would depend, to a large extent, upon the peculiar location of the place at which he went upon the track. An ordinarily prudent person in the possession of all his faculties would not attempt to cross a railroad track at any place without using at least his sense of sight; if not that of hearing, to determine whether, at the time and place he was about to cross the same, there were present any of those dangers which a person of ordinary intelligence would reasonably apprehend."

This charge was given at the request of the defendant, with this exception, that the judge substituted the word "should" for "would" where it occurs in the last paragraph of the charge and plaintiff in error contends that it changed the whole force of the charge. This assignment can not be sustained. Instructing the Jury that the care required is such that an ordinarily prudent person "would" exercise" is equivalent to saying "should exercise" the words would and should import the same meaning, and the best authorities use them interchangeably.

Blythe vs. Birmingham Water Works, 11 Exch. 781

Words & Phrases, Vol. 8, page 1527.

The action of the trial court in sustaining a demurrer to so much of defendant's answer, setting up, by amendment, the

Statute of Georgia governing trains in approaching a public road crossing, known as "the blow-post and checking act," is assigned as error and particularly the ruling as to the second clause thereof which requires the Engineer to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road." This legislative act appears in the statement and is known as section 2222 of the Civil Code (1895), and was formerly section 708 Civil Code (1882).

The brief and argument of the plaintiff in error largely rests the disposition to be made here upon this assignment. An examination of the act complained against, and its construction by the courts of Georgia, will relieve it from the suggestion that it was enacted for the purpose of regulating interstate commerce.

This statute was passed January 22nd, 1852 (Acts 1852, p. 8) and became effective on the first of February thereafter. The original act provided that blow-posts should be erected at a distance of 200 yards from each public road crossing and a sign at the crossing in large letters with the warning: "when you hear the whistle blow look out for the engine." As amended, the distance of the blow-post is 400 yards and the warning sign has been eliminated. This enactment resulted from an accident to Mrs. Winn, her children and driver, which occurred at a public road crossing on the line of the Macon & Western Railway on December 14th, 1851, resulting in the death of two of the children and the driver, and serious injuries to Mrs. Winn and one child, the limbs of the former being broken and the skull of the latter fractured. The catastrophe was of such a serious nature, that the General Assem-

bly, then in session, promptly passed the act above referred to. This accident was the foundation of the cases of Davis and Winn, reported in 18 Ga. 679; 19 Ga. 440; 26 Ga. 250.

It being conceded, or rather found as a fact by this court, that the legislative intent was to protect travelers and others in the use of the public highways of Georgia and not to regulate inter-state traffic, it is still permissible, and ordinarily a matter of duty, to inquire what effect the statute has upon trains engaged in inter-state commerce, for the reason that the intent may be waived, or dismissed, and still the courts are not relieved from the necessity of ascertaining the practical effect of a particular act, for if it be conceded that the Legislature of a state is inhibited from passing any law which has the effect of regulating that which was directly committed to the Nation in the adoption of the Constitution, it follows, that duty would not be performed, short of the declaration, that such legislaion is beyond the scope and power of the State. The authorities supporting this proposition, may be found in Gibbons v. Ogden, 9 Wh. p. 1., decided as early as 1824, the opinion being by Chief Justice Marshall, and in all subsequent cases where the question was at issue and particularly the case of Hennington vs. Georgia 163 U. S. 299, where the earlier decisions are reviewed. If the act under discussion is but the reasonable exercise of the police power of the State, though it may effect and tend, in a measure, to regulate inter-state commerce, it would not be obnoxious nor a subject for inquiry by this court, until such time as the Congress may enact legislation covering this particular question. It appears to have been passed for the sole purpose of protecting those who may use public highways and presumably has its classification under the

police power relating to the public safety. It may be contended, however, that the safety of the public is so remotely involved that the effect of the enactment is unreasonable and places an undue budren upon the carrier. While this Act in regard to its effect upon inter-state commerce has never been presented to the Supreme Court of Georgia, as appears from an examination of the reports of that State from Vols. 18 to 128, the statute has frequently been construed in regard to local action, and uniformly uheld, though the Supreme Court of that State has seen proper to subject it to criticism.

In affirming the judgment in Central of Georgia Railway Company vs. Hall, 34 S. E. 605, the Supreme Court makes the following observations concerning section 2222 of the Georgia Code:

"We agree with the learned counsel that this law which requires trains to check, and keep checking when approaching crossing is a hard one, and that it is impossible for the railroads of the country to transact the business of the country and obey it. It was passed about 50 years ago, before the people appreciated the necessity of rapid transit in travel and in freight. If the law was duly obeyed by the locomotive engineers, I am informed that it would take 12 hours or more to run a passenger train from Atlanta to Macon, a distance of about 100 miles; still it is the law of the land and the courts must enforce it, however, hard it may work upon the business interests of the country, if it should be observed, or upon the railroads when they violated it."

Where the servants of the railroad company fail to observe it and any person or property is injured upon the crossing, the company can make no defense, except that the injury was done by the consent of the person injured, or that he could have avoided the injury by the observance of ordinary care, or that his negligence contributed to it in the way of mitigation of damages."

In Bowen vs. Gainesville et. Ry. Co. 22 S. E. p. 695, Mch. 25, 1895, the Supreme Court referring to the requirement to check, says that requirement has frequently been construed to mean must have his train under such control, that he can bring it to a complete stop, if necessary, to prevent a collision upon the track itself, and should it be strictly obeyed, a collision of any sort would be rendered impossible and there would be no necessity whatever for any warning of the approach of the train by the blowing of the whistle."

The question of the validity of State Statutes and orders of State railroad Commissions directing the stoppage of through inter-state trains have frequently, within late years, been before the Supreme Court of the United States. One of the recent cases is that of Mississippi Railroad Commission vs. Illinois Central 203 U. S. 335, and Atlantic Coast Line Railroad vs. North Carolina Commission, 206 U. S. 1. The last declaration by the Supreme Court is found in the opinion rendered Dec. 9, 1907 in Atlantic Coast Line Railroad vs. South Carolina Commission, in which Mr. Justice Peckham, speaking for that tribunal uses the following language:

"That any exercise of State authority in whatever form manifested, which directly regulates inter-state commerce is repugnant to the commerce clause of the Constitution, is obvious. It hence arises that any command of a State, whether made directly or through the instrumentality of a railroad commission, which orders, or the necessary effect of which is to order, the stopping of an inter-state train at a named station or stations, if it directly regulates interstate commerce, is void."

In Gladson v. Minnesota, 166 U. S. 430, it was said:

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"The principles of law which govern this case are familiar, and have been often affirmed by this court. A railroad corporation created by a State is for all purposes of local government a domestic corporation and its railroad within the State is a matter of domestic concern. Even when its road connects as most railroads do, with railroads in other States, the Staate which created the corporation may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. It may prescribe the location and the plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience and comfort of the passengers and of the public. All such regulations are strictly within the police power of the State. They are not in themselves regulations of inter-state commerce; and it is only when they operate as such in the circumstances of their application, and conflict with the express or presumed will of Congress exerted upon the same authority of the Constitution of the United States. Stone v. Farmers' Loan & Trust Co. 116 U. S. 307, 333, 334; Smith v. Alabama, 124 U. S. 465, 481, 482; Hennington v. Georgia, 163, U. S., 299, 308, 317; New York, New Haven & Hartford Railroad v. New York, 165 U. S. 628, 632."

The majority of the court are of opinion that Gladson v. Minnesota, supra, and authorities therein cited, sustain the constitutionality of the Statute; that the same is a valid exercise of the police power of the State, and therefore, the trial court did not err in sustaining the demurrer to the amended answer.

The writer entertains the view that the Statute is valid in so far as domestic corporations are concerned; but unreasonable and void as to trains engaged in inter-state commerce.

The business of the country must go on and in the language of the Supreme Court of Georgia, in Central Railway v. Hall, supra, "it is impossible for the railroads to transact the business of the country and obey it."

Any exercise of State authority in whatever form manifested, which directly regulates, or the necessary effect of which

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is to regulate interstate commerce is void. Atlantic, etc. Ry. v. South Carolina, supra.

Plaintiff in error excepted to the ruling of the court in excluding the testimony of Ben Dewberry, in charge of the engine at the time of the collision, in that said witness being called to testify in behalf of the defendant below, in response to a question from counsel, answered: "There are between 90 and 100 crossings on the Southern Railway between the South Carolina line and Atlanta." The question was objected to because incompetent, immaterial and inadmissible with the observation by counsel: "I think the entire case should be confined to this crossing." Counsel for defendant stated, "I expect to prove that between the South Carolina line and Atlanta, there are practically 100 road crossings, or between 85 and 100 public road crossings; that the distanc is 101 miles; that the crossings in some localities are very close together, and within a few hundred yards of each other, and of others further apart; the average making about a crossing to the mile almost"; we expect to show further, that to observe the statute, and check and keep checking, so as to have the train under control, and to stop, should any person or thing be on the crossing, would consume from 5 to 10 minutes at each crossing, depending upon the weight and length of train and grade. We wish to show that this train was made up and known as No. 39 vestibule train, which runs from the City of Washington through the States of Virginia, North and South Carolina and Georgia; that it was carrying passengers from one State to another, and also carried an express car with freight. We expect to show that obedience to that crossing Act would hinder and practically prevent inter-state business being done by the defendant."

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The objection was sustained, testimony excluded, and exception noted. We are of the opinion that there was no error in the action of the court in sustaining the objection, as the testimony was not properly admissible in the absence of pleading to support it. This view seems to have obtained with counsel for defendant below, as evidenced by the amendment filed and heretofore discussed.

Pleadings of the parties are the allegations made by the parties to a civil, or criminal case, for the purpose of definitely fixing and presenting the issues to be tried and determined between them; and the facts from which the law draws the conclusion of non-liability, must be pleaded in the answer, where they are not stated in the petition.

Under section 914 of the Revised Statutes of the United States, it is provided that the practice, pleadings, forms and modes of proceeding in civil causes, other than equity and admiralty, in the Circuit and District Courts shall conform, as near as may be, to the practice, pleadings, forms and modes of proceeding existing in like causes in the Courts of record of the State in which such Circuit and District Courts are held.

The only object, and the avowed purpose of tendering this testimony, was to show the invalidity of the statute in so far as it related to trains engaged in inter-state traffic, and this, without special plea, would not be permissible under the practice and pleadings obtaining in Georgia, See Parham & Co. vs. Potts-Thompson Liquor Co. 56 S. E. 460 and cases there cited.

The validity, or invalidity of a Statute, can not be considered upon appeal, unless the record shows that the question was distinctly raised in the pleadings in the Court below.

Savannah etc. Ry. Co. vs. Hardin, 35 S. E. 681.

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A subsequent assignment complains of the refusal to direct a verdict for the defendant. The evidence was sharply in conflict and the charge requested, would have invaded the province of the Jury.

The last assignment seeks to review the following paragraph of the general charge to the Jury:

"Under the statutes of Georgia, gentlemen, which have been referred to, it is the duty of engineers of trains in Georgia when approaching a crossing(to blow the whistle, as stated to you by counsel, and to check, and keep checking their trains as they approach the crossing, so as to be able to stop them if any person or thing should be upon the crossing. That is the statute of this State, and it is entirely clear that they were not doing that in this case; so there is no question that the railway company, through its servants and agents, was guilty of negligence. I, therefore, instruct you as a matter of law, that the defendant through its servants, agents and employees was guilty of negligence."

This point is reserved, but the brief contains neither authority nor argument in support of the proposition. The failure to comply with a state statute is held to be negligence per se in Georgia and many other jurisdictions. The engineer testified that he sounded the whistle at the blow-post, 400 yards from the crossing, but did not continue to blow until the crossing was reached, and made "no effort to comply with the statute in any other particular," and only attempted to check his train when he realized the danger of collision. The object of blowing the whistle is to give timely warning of the approach of the train. It follows that, if a person about to go upon the crossing, sees, hears, or otherwise knows of the approach of the train in time to avoid injury, the object of the statute has been accomplished, and in that event failure to give the statutory warning would not be negligence. This view occurred to the

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trial court, and the record discloses that upon this point the jury was charged:

"If by the exercise of ordinary care and prudence the deceased could have ascertained by the use of his sense of hearing, and of sight, that the train was approaching, and thereby avoided the accident, his widow can not recover in this action."

And further:

"If you believe that King drove on the crossing without having stopped and listened, and if he had listened he would have heard the approach of the train in time to have avoided the injury, then, I charge you that his widow can not recover."

If the charge is error, which we do not concede, it is rendered harmless by the further charge, to-wit:

"Notwithstanding the negligence of the defendant (in failing to comply with the statute) if the deceased, by the exercise of ordinary care could have avoided the consequences of defendant's negligence, his widow can not recover."

The same rule was applied to the daughter, with the exception that the negligence of the father, if any, could not be attributed to her.

Upon the whole case, as made by the pleadings and testimony, the law was clearly presented, the assignments disclose no error, and the judgments should be in all things affirmed."

Your petitioner shows that the enforcement of the Statute in Georgia known as the "Blow-Post Statute," set out above, is a direct burden upon its inter-state commerce operations; that the majority of the United States Court of Appeal, in the above decision, erred in holding that the enforcement of said Statute was not an enfringement of the inter-state commerce clause of the Federal Constitution.

Your petitioner further shows that the Federal question thus made is one of great importance; not only in the State of Georgia, but wherever inter-state carriers may be operated; that the principal therein contained is applicable to many thousand crossings in the State of Georgia, and would likewise be applicable throughout the entire United States; that the Federal question thus made arose after the case had been removed into the United States Circuit Court, and was passed on by the Circuit Court of Appeals.

Your petitioner believes that the aforesaid judgment of the Circuit Court of Appeals is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such case made and provided.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals, for the Fifth Circuit, commanding the said Court to certify and send to this Court, on a day certain, to be designated, a full and complete transcript of the record, and all proceedings of the said Circuit Court of Appeals in said case therein entitled SOUTHERN RAILWAY COMPANY, Plaintiff in Error, vs. INEZ KING, by next friend, Mrs. Josephine King, Defendant in Error, No. 1635, to the end that the said case may be reviewed and determined by this Court, as provided in Paragraph Sixth of the Act of Congress entitled an Act to Establish Circuit Courts of Appeal and to provide and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes, approved March 3, 1891; or that your petitioner may have such

other and further relief, or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act; and that the said judgment of the said Court of Appeals in the said case, and every part thereof may be reversed by this Honorable Court. Your petitioner presents herewith a Brief sustaining his application for certiorari, and likewise a certified copy of the transcript of record, including therein all the proceedings of the United States Circuit Court of Appeals; and your petitioner will ever pray, etc.

JNO. J. STRICKLAND,
Counsel for Petitioner.

STATE OF GEORGIA,
COUNTY OF CLARKE, } JNO. J. STRICKLAND being duly sworn says that he is one of the Counsel for the Southern Railway Company, the petitioner, that he prepared the foregoing petition, and that the allegations thereof are true, as he verily believes.

JNO. J. STRICKLAND.

Subscribed to and sworn before JNO. J. STRICKLAND. This 18th day of April, 1908.

My Commission expires Feb. 17, 1912.

ROY M. STRICKLAND,
N. P. Clarke County, Ga.

NOTICE OF APPLICATION
TO THE SUPREME COURT OF THE UNITED STATES
FOR WRIT OF CERTEIORARI.
UNITED STATES SUPREME COURT.

THE SOUTHERN RAILWAY COMPANY,
Petitioner,
vs.
INEZ KING, by next friend,
Respondent.

The respondent is hereby notified that the petitioner the SOUTHERN RAILWAY COMPANY, will, on Monday the ——— day of ——————— 1908, upon its verified petition, and a copy of the entire record in this case, at the opening of the Court, on that day or as soon thereafter as Counsel can be heard, submit a motion, a copy of which, and of the petition for writ of certiorari, and Brief in support thereof, are herewith delivered to you to the Supreme Court of the United States in its Court Room, at the Capitol in the City of Washington, D. C.

JNO. J. STRICKLAND,
Atty. for Petitioner, Southern Ry. Co.

The foregoing notice is hereby accepted and delivery of a copy thereof, and of the petition for writ of certiorari and Brief in support of the petition, are hereby acknowledged.

_____

Attorney for Respondent.

The 18th day of April, 1908.

THE SUPREME COURT OF THE UNITED STATES.

——————Term, 1908.

SOUTHERN RAILWAY COMPANY,
Petitioner,
vs.
INEZ KING, by next friend,
Respondent.

COMES NOW the SOUTHERN RAILWAY COMPANY, by JNO. J. STRICKLAND, Esq., its Counsel, and moves this Honorable Court that it shall, by certiorari, or other proper process directed to the Honorable the Justices of the United States Circuit Court of Appeals for the Fifth Circuit, require said Court to certify to this Court for its rievew and determination a certain case in said Court of Appeals, lately pending, wherein the respondent, INEZ KING, by next friend, was defendant in error, and your petitioner the SOUTHERN RAILWAY COMPANY, the plaintiff in Error, and to that end it now tenders herewith its petition, and Brief, with a certified copy of the entire record case in said Circuit Court of Appeals.

JNO. J. STRICKLAND,
Counsel.

UNITED STATES SUPREME COURT.

SOUTHERN RAILWAY COMPANY,
Petitioner,
vs.
INEZ KING, by next friend,

Error to the U. S. Circuit Court of Appeals.

BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

On the 29th of September, 1904, INEZ KING, by her next friend, Mrs. JOSEPHINE KING, filed in the Superior Court of Habersham County, her petition against the Southern Railway Company, in which she claimed Ffteen Thousand ($15,000.00) Dollars damage. She alleged that on the 11th of October, 1903, she and her mother, Josephine King and her father, A. O. King, were travelling in a buggy, and in crossing the Southern Railway Company's tracks at a public crossing she was struck by the engine of one of defendant's trains and seriously and permanently injured. She alleges that the injuries she sustained were due to the negligence of the defendant Railway Company in that the engineer of the train striking her, failed to check the train before reaching the crossing over which petitioner was passing as required by the statute of Georgia. The Railway Company, the defendant below, removed this case into the United States Circuit Court for the Eastern Division of the Northern District of Georgia. At the first term defendant filed a general answer to plaintiff's petition. On the 24th of April, 1906, defendant Railway Company filed an amendment to its former answer setting up that the

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Statute of Georgia requiring the defendant to check its trans at the public crossings was inapplicable to the defendant railway, because the same was an inter-state railway, and the Act was in violation of the Commerce clause of the Federal Constitution. This was demurred to upon the ground that it did not set up a legal defence, and the demurrer was sustained by the Honorable W. T. Newman, Judge presiding.

During the progress of the case Ben Dewberry, an Engineer of the Company was a witness on the stand and the following occurred:

"BEN DEWBERRY, stated that:

'There are between ninety-and one-hundred crossings on the Southern Railway, between the South Carolina line and Atlanta.'"

"Plaintiff's counsel said:

'I object to that question and to the answer, because incompetent, immaterial and inadmissible. I think the entire case should be confined to this crossing.'"

"Counsel for defendant then stated:

'I expect to prove that between the South Carolina line and Atlanta, there are practically one-hundred road crossings, or between eighty-five and one-hundred public road crossings; that the distance is one-hundred and one miles; that the crossings in some localities are very close together, and within a few hundred yeards of each other, and at others farther apart, but on the average making a crossing to the mile almost. We expect to show further, that to observe the statute and check and keep checking so as to have a train under control, and to stop should any person or thing be on the crossing it would consume from five to ten minutes for each crossing dependent,

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of course, upon the weight and length of the train, and the grade; but it would make an average of seven or eight minutes. We wish to show that this train was made up and known as No. 39, the vestibule train which runs from the City of Washington, through the States of Virginia, North Carolina, South Carolina and Georgia; that it was carrying passengers from one state to another, also carrying an express car with freight on it, from one state to another. We wish and expect to show that obedience to that Crossing Act would hinder, and practically prevent inter-state business being done by the defendant railroad. We wish to show the condition I have just stated all existed at the time this accident occurred, on the 11th of October, 1903.'"

"By the Court:

'The testimony will be excluded, and you may have an exception noted to this ruling.'"

SPECIFICATION OF ERRORS RELIED UPON.

The Plaintiff in Error relies upon the following errors:

I.

The Court erred in striking the amendment setting up that the Crossing Statute was inapplicable to an inter-state railroad.

II.

The Court erred in ruling out the evidence of Ben Dewberry.

The next question involved is whether or not the amendment seting up that the checking statute was inapplicable to an inter-state railroad was a good defense.

The Statute Section 2222 of the Civil Code of Ga., is as follows:

"There must be fixed on the line of said road, and at the distance of four hundred yards from the center of each of such road crossings, and on each side thereof, a post, and the engin-

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eer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road."

Section 2224 of the Code provides in part as follows:

"If any engineer neglects to blow said whistle as required and to check the speed as required, he is guilty of a misdemeanor," etc.

Plaintiff in error insisted below that the part of this statute requiring it to check was inoperative as to it, because plaintiff was an inter-state railroad, doing an inter-state business, including carrying the mail, and that this act was a burden upon its inter-state business, and in violation of the commerce clause of the Federal Constitution.

The demurrer to the plea admitted the allegations therein made, but insisted that it did not constitute a legal defense. I submit that the plea set up a legal defense and should not have been stricken on demurrer for the following reasons:

INTER-STATE COMMERCE COMMISSION.

1. The Federal Congress has provided for Inter-state Railroads: Revised Statute, Paragraph 5258 provides as follows:

"Every railroad company in the United States, whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and other property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of designation."

By the Act of Feb. 4, 1887, entitled: "An Act to Regulate Commerce", Congress created the Inter-state Commerce Commission, and enacted that the provisions of that Act should "apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad,

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or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment from one state or territory of the United States, or the District of Columbia, to any other State or territory of the United States * * * * and that it should be unlawful for any common carrier subject to the provisions of the Act, to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedules, carriages in different cars, or by other means or devices, the carriage of freight from being continuous from the place of shipment to the place of destination."

These Acts not only provided for interstate business, but likewise placed the same under the control of the Commerce Commission, and prevented them from entering into any contract which should have the effect to thwart the purposes of the interstate traffic. The interstate carrier is amenable to the Interstate Commission should it fail to discharge its duties as a carrier or to carry freight or passengers in a reasonable time and the State Commission has required freight to be moved a given number of miles per day and the carrier is liable both in penalty and damages for failure.

POLICE REGULATIONS.

2. It is insisted that the Statute under consideration is good because it is an exercise of the police power of the State. This police power has its limitations, and if it infringes the interstate commerce clause of course is void. It is not necessary that Congress should expressly enact a supervision over the interstate commerce, the Constitution itself provides for it.

Mr. Justice Field speaking for the Court in the case of

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Wellton v. Missouri, 91 U. S., 282, with reference to this question says:

"Non action by Congress is equivalent to a declaration that interstate commerce shall remain *free* and *untrammelled.*"

Does an Act of the Legislature of a State which requires that an inter-state railroad shall check its trains at each crossing to the extent that it cannot carry on its business, leaves inter-state commerce *free* and *untrammelled?* It is not good as police regulation unless it does.

Mr. Justice Gray, in the case of Ill. Cent. R. R. Co., vs. Ill., 163 U. S., page 154, in discussing what is a reasonable regulation by a State says:

"The State may make reasonable regulations to secure the safety of passengers, even on interstate trains, while within its borders. But the state can do nothing which will directly *burden* or *impede* the interstate traffic of the company, or *impair* the *usefulness* of its *facilities* for such traffic."

It was offered in evidence in this case to show that from the South Carolina line to Atlanta, Ga., there were about one-hundred crossings, and about one-hundred and one miles, or about a crossings to the mile; that a train observing the statute under consideration would lose from five to ten minutes at each crossing; that it would thus take hours to go from the State line to the City of Atlanta above its present schedule. Can it be said that such a statute will not *burden* or *impede* the interstate traffic of the Company, or that it will not *impair* the usefulness of its facilities for such traffic? Burden is defined: "To incumber with weight (literal or figurative); to law a heavy load upon, to load". Impede is defined: "To hinder; to stop in progress; to obstruct". Impair is defined: "To make worse; to diminish in quality, value, excellence or strength: to deteriorate".

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3. The Statute under consideration is peculiar to Georgia. I have found nothing like it anywhere else, nor have I been able to find an authority dealing directly with the question made.

Mr. Elliott in his work on Railroad, Vol. 2nd, paragraph 668, uses this language:

"The authorities are agreed that where the trains move upon or across highways their speed may be regulated, but there is a contrariety of opinion as to whether the speed of trains operating exclusively upon the private property of the company can be limited."

He cites as authority to support this text a number of State cases, but so far as I have been able to find they all have dealt with intra-railroads and the question at bar was not involved. A kindred question and the principle has been before the U. S. Supreme Court several times.

In the case of Ill. Central R. R. Co. vs. Ill., 163 U. S., page 154, it was held that an act of the State of Ill., requiring all trains to stop at the town of Cairo was an unreasonable exercise of police power of the State as applied to inter-state railroads.

In the case of Gladstone v. Minnesota; 166 U. S., page 431, it was held that the doctrine announced in the 163d U. S., above quoted was not applicable because the road in question was an Intra-state railroad.

In the case of Lake Shore & Michigan Ry. Co. vs. State of Ohio, reported in the 173d U. S., page 285, it was held that a statute requiring three trains each way to stop at each town of 3,000 inhabitants daily was a reasonable exercise of the

police power. I call atention of the Court to the dissenting opinion of Mr. Justice Shiras found on page 309 of the report, which goes into the authorities pertaining to the case; and likewise the opinion of Justices Brewer, White, and Peckham concurring in this dissenting opinion contained on page 335.

The case of Cleveland, Chicago, Cincinnati & St. L. R. R. Co., reported in 177 U. S., page 514, the head note is as follows:

"The requirement that all regular passenger trains must stop at County seats, which is made by the Illinois Act of March 21, 1874, constitutes a direct burden upon inter-state commerce in violation of the U. S. Constitution, so far, at least, as that statute requires through inter-state passenger trains to stop at such station when adequate train service has been provided for local traffic.

This case takes up a number of cases cited. It quotes from Mr. Justice Gray, as follows:

"The State may doubtless compell the railroad company to perform the duty imposed by its charter of carrying passengers and goods between its termini within the State. But so long, at least, as that duty is adequately performed by the company, the State cannot, under the guise of compelling its performance, interfere with the performance of paramount duties to which the company has been subjected by the Constitution and laws of the United States."

This case further calls attention to the fact that that of Gladson vs. Minnesota, above cited, is upheld upon the ground that it was dealing with an Intra-State railroad.

It further calls attention to the fact that the case above cited in the 173 U. S., page 285, can be upheld upon the grounds

that it only applies to three trains running each way each day and leaves a loophole for through trains.

Mr. Justice Brown, in delivering the opinion of the Court in the 177 U. S. above cited, uses this language:

"It is evident that the power attempted to be exercised under this statute would operate as a serious restriction upon the speed of trains engaged in inter-state traffic, and might, in some cases, render it impossible for trunk lines running through the State of Illinois to compete with other lines running through states in which no such restrictions were applied. If such passenger trains may be compelled to stop at county seats it is difficult to see why the legislature may not compel them to stop at every station,—a requirement which would be practically destructive of through travel, where there were competing lines unhampered by such regulations. While as we held in the Lake Shore case, railways are bound to provide primarily and adequately for the accommodation of those to whom they are directly tributary, and who not only have granted to them their franchise, but who may have contributed largely to the construction of the road, they are bound to do no more than this, and may then provide special facilities for the accommodation of through traffic. We are not obliged to shut our eyes to the fact that competition among railways for through passenger traffic has become very spirited, and we think they have a right to demand that they shall not be unnecessarily hampered in their efforts to obtain a share of such traffic. It is evident, however, that neither the greater safety of their tracks, the superior comfort of their coaches or sleeping berths not the excellence of their tables would insure them such share if they were unable to compete with their

rivals in the matter of time. The great efforts of modern engineering have been directed to combining safety with the greatest possible speed in transportation, both by land and water. The public demand this, the railway and steamship companies are anxious in their own interest to furnish it, and local legislation ought not to stand in the way of it." "While the Statute in question is operative only in the State of Illinois, it is obnoxious to the criticism made of the Louisiana statute in Hall v. DeCuir, 95 U. S. 485, that 'while it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct, to some extent, in the management of his business throughout his entire voyage. If each state were at liberty to regulate the *conduct* of *carriers* while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight regardless of the interest of others."

The principle above announced with reference to the statute requiring each train to stop at each county seat would doubly apply to a Statute that required each train to stop at each public crossing. If stopping once in each county, many miles apart, is a burden, what is to be said of a statute requiring the train to stop once each mile?

Applying this rule to the evidence in the case and it seems there can be no doubt of the effect of the statute. As stated, for the purpose of the demurrer it was admitted that the railroad could not carry on its business in consequence of the necessary delay, if required, to comply with this statute.

Another view of the operation and effect of the statute is

worthy of consideration. The statute was enacted in 1852, at a time when there were no inter-state railroads and very few others in Georgia. There is not a road in the State which attempts to comply with the statute. While the act provides that the engineer who fails to observe the same is guilty of a misdemeanor, no engineer has ever been prosecuttd for such violation, except where some special damage case rendered it necessary. It is a statute therefore enacted at a tim when inter-state railroad companies did not exist. It is recognized by the railroads themselves as inoperative. The public demands a speed that cannot be obtained and observe this statute. The public fail and refuse to prosecute the engineer violating the statutes hundreds of times every day, because doubtless they realize its hardship. Such a statute when it is apparent that if enforced it would break up inter-state railroad business; that it would prevent the mails from being carried, and render it impossible for an inter-state road to comply with the requirements of the inter-state railroad commission as well as the State Commissions the same should be declared void.

As was said by the learned Judge, who delivered the opinion in this case in the Circuit Court of Appeals:

"The question of the validity of State Statutes and orders of State railroad Commissions directing the stoppage of through inter-state trains have frequently, within late years, been before the Supreme Court of the United States. One of the recent cases is that of Mississippi Railroad Commission vs. Illinois Central 203 U. S. 335, and Atlantic Coast Line Railroad vs. North Carolina Commission, 206 U. S. 1. The late declaration by the Supreme Court is found in the opinion rendered Dec. 9, 1907 in Atlantic Coast Line Railroad vs. South Caro-

lina Commission, in which Mr. Justice Peckham speaking for that tribunal uses the following language:

"That any exercise of State authority in whatever form manifested, which directly regulates inter-staate commerce is repugnant to the commerce clause of the Constitution, is obvious. It hence arises that any command of a State, whether made directly or through the instrumentality of a railroad commission, which orders, or the necessary effect of which is to order, the stopping of an interstate train at a named station or stations, if it directly regulates inter-state commerce, is void.'"

The case of Gladson vs. Minnesota, 166 U. S., page 430, upon which the Court below rests, its decision was dealing with an intra-state railroad, and the question decided in that case, I respectfully submit, so far from being authority against my contention, is in support of it. In that case the railroad in question was chartered by the State of Minnesota; it had its franchise from that State. While it connected with other roads, it was doing purely an intra-state business. It was amenable to the power that created it. It took its franchise with a burden of obeying the conditions upon which it was created. In the case at bar the Southern Railway Company was a foreign corporation, chartered by the State of Virginia, and was operating in Georgia by virtue of the authority of an Act of Congress. While it is amenable to the laws of Georgia, the State cannot impose a burden, or in any way impede its usefulness as a means of inter-state traffic.

In the Minnesota case, stated above, the railroad was chartered by that State. In the case at Bar, the railroad is chartered by another State.

In the Minnesota case the Railroad in question was doing purely an intra-state business. In the case at Bar the railroad in question was doing principally an inter-state business.

In the Minnesota case the railroad operated by the authority of that State alone. In the case at Bar the Southern Railway operated by the authority of the Federal Congress.

The idea that a State may regulate its own creature, and the reason therefor is recognized by the learned Justice delivering the opinion in the Minnesota case, where he says, on page 431, "The Legislature of the State may well treat it as one important object of establishing a railroad within the State that public officers, parties to action, jurors, witnesses and citizens generally should be enabled the more promptly to reach and leave the centers to which their duties or business may call them, to require every regular passenger train running wholely within the limits of the State to stop at all stations, at County seats directly in its course for a few minutes and at a trifling expense, in order to take on and discharge passengers with safety, is a reasonable exercise of the police power of the State, and cannot be construed a taking of property of the company without due process of law, nor an unconstitutional interference with inter-state commerce, or with the transportation of the mails of the United States."

The case further goes on and distinguishes it from that of the Illinois Central R. R. Co., 163 U. S. 142, by calling attention to the fact that in the latter case, was where a train was running "carrying inter-state passengers and the U. S. Mails from Chicago in the State of Illinois, to places in other States South of the Ohio River, from an inter-state highway, established by authority of Congress," etc.

Thus recognizing the difference between the application of the relation to an intra-state Railroad, operating by the author-

ity of the State, and an inter-state Railroad operating by the authority of Congress.

This Court, in the case of Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., 177 U. S., on page 519, in dealing with the case of Gladson vs. Minnesota, recognizes the distinction that I have endeavored to point out between that and this, and in this case distinguishes the Gladstone case from the one being considered as to leave it of no weight as authority.

The case of Cleveland vs. Ry. Co. 177 United States, being considered, was where a Statute of Illinois, dated March 21, 1874, requiring that all regular passenger trains must stop at County seats, was held to be a direct burden upon inter-state commerce; and therefore void. On page 514 this language is used: "The requirement that all regular passenger trains must stop at County seats, which is made by the Illinois Act of March 21, 1874, constitutes a direct burden upon inter-state commerce, in violation of the United States Constitution, so far at least as that Statute requires through inter-state passenger trains to stop at such stations, when adequate train service has been provided for local traffic."

This case clearly draws the distinction; it is dealing with a statute requiring a train to stop at the county seat. The Gladson case, above cited, is likewise dealing with the same character of Statute in Minnesota. In this case the statute is held a burden upon inter-state commerce. In the Gladson case the Statute is upheld. The reason they are both upheld can only be that the one was an intra-state train being controlled, and the other an inter-state.

EFFECT OF STATUTE.

In the case of Morgan Steamship Company, 118 U. S., page

455, it is said: "In all cases of this kind it has been repeatedly held that when the question is raised whether the State statute is a just exercise of state power, or is intended by roundabout means to invade the domain of Federal authority, this court will look into the operation and effect of the statute to discern its purpose."

Applying this rule to the evidence in the case and it seems there can be no doubt of the effect of the statute. As stated, for the purpose of the demurrer it was admitted that he railroad could not carry on its business in consequence of the necessary delay, if required, to comply with this statute.

Another view of the operation and effect of the statute is worthy of consideration. The statute was enacted in 1852, at a time when there were no inter-state railroads and very few others in Georgia. There is not a road in the State which attempts to comply with the statute. While the act provides that the engineer who fails to observe the same is guilty of a misdemeanor, no engineer has ever been prosecuted for such violation, except where some special damage case rendered it necessary. It is a statute therefore enacted at a time when inter-state railroad companies did not exist. It is recognized by the railroads themselves as inoperative. The public demands a speed that cannot be obtained and observe this statute. The public fail and refuse to prosecute the engineer violating the statutes hundreds of times every day, because doubtless they realize its hardship. Such a statute when it is apparent that if enforced it would break up inter-staate railroad business; that it would prevent the mails from being carried, and render it impossible for an inter-state road to comply with the requirements of the inter-state railroad commission as well as the State Commissions the same should be declared void.

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IMPORTANCE OF THE QUESTION PRESENTED.

In presenting this application for certiorari I have not lost sight of the rule that a certiorari is not a matter of right, but one of grace, and will only be granted where the question submitted is of such importance as to require it. In this case I think it should be granted for the following reasons:

1. As a means for securing uniformity of decision among the several Courts of Appeal. The question made is one liable to arise in any jurisdiction, and it should be determined by this Court for the benefit of all.

2. It is a Federal question, involving the interest of the public, and of the Railroads through the entire State of Georgia, and through the entire United States, where the operation of inter-state Railroads are liable to be interferred with. There are thousands of such crossings in the State of Georgia where the Statute being called into question is being violated daily. It is a matter that involves, annually, many thousands of dollars. It is impossible, as appears from a quotation of a decision of the Supreme Court of Georgia, in the opinion rendered in this case, for the railroads to obey this statute. There is no effort being made to obey it; and yet if an accident happens at a crossing, under this Statute, there is absolutely no defense.

3. While the rule in the Federal Court, that a man approaching a crossing must look and listen, or he cannot recover for injury, yet this Statute requires the railroad to give notice and check so as to stop if the careless should be on the crossing.

4. The Court below rendered a divided opinion. The Court itself is therefore not uniform. The Justice writing the opinion did not subscribe to that part of it upholding the Statute in

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question. The Court of Appeals in another Ciricuit might agree on a similar question with the Judge writing the opinion in this case. Thus different opinions on the same question will arise, and it should be determined by this Court for the benefit of all.

5. The opinion of the majority in the Court below, petitioner respectfully submits, is not in line with the decisions of this Court cited in the Brief, and the question should therefore be reviewed.

Respectfully submitted,

JNO. J. STRICKLAND,

Attorney for Petitioner, So. Ry Co.

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NO.

IN THE

Supreme Court of the United States.

Southern Railway Company

Petitioner

vs.

Inez King, by next friend

Respondent

Brief for Inez King, by next friend,
in opposition to the petition for Certiorari

Reuben R. Arnold

Attorney for Respondent

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SOUTHERN RAILWAY CO.
Petitioner

vs.

INEZ KING, by Next Friend,
Respondent.

In the Supreme Court
of the
United States.

Brief for INEZ KING, by Next Friend, in Opposition to the Petition for Certiorari.

In preparing this brief we will follow the rule laid down for the filing of briefs for defendants in error and will omit a statement of the facts and will also omit any specification of the errors, except in so far as to make clear our discussion of the law.

The opinion of the Circuit Court of Appeals fully sets forth the facts. Defendant did not show how or wherein the statute of Georgia complained of interferred with interstate commerce, except that in its opinion the checking of the speed of trains would render schedules slower. The defendant in its answer

merely set up that the train which injured the plaintiff was a through train, made up in Washington, D. C., and carried the mail, express, merchandise and passengers, and was doing an interstate business; and the answer further set up the provisions of the blow post law of Georgia, and wound up with the conclusion that the statute was a burden on and impeded interstate traffic.

Upon the trial of the case, the defendant proposed to prove by Engineer Dewberry that between the South Carolina line and Atlanta, there were between ninety and one hundred crossings, counsel stating that

"There are practically one hundred road crossings, or between eighty-five and one hundred public road crossings; that the distance is one hundred and one miles; that the crossings in some localities are very close together and within a few hundred yards of each other, and in others further apart, but on the average making a crossing to a mile almost. We expect to show further, that to observe the statute, and check and keep checking so as to have the train under control, and to stop should any person or thing go on the crosing, it would consume from five to ten minutes for each crossing, dependent of course, upon the weight and length of the train and the grade; but it would make an average of seven or eight minutes."

It will be observed that this offer of testimony was vague, that it did not state how close together the crossings were, and that it did not pretend to show with any degree of accuracy how much it would impede a train from the South Carolina line to Atlanta to comply with this Act, whether it would lose one

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hour or two hours or any other given time, was not stated by counsel.

There are many inadmissible portions in the proposed testimony, and the court will observe that it was offered as a whole. If as a whole it was inadmissible, then no particular fragment can be picked out and passed on by the court. It will be further observed that there was no claim that this train carried the United States mail, and as a matter of fact, it did not, so far as the evidence shows. The counsel was indefinite as to the distance apart of the crossings. There was no attempt at exactness. He was indefinite as to the time it would delay each train. He did not show how much it would delay any given train, nor how it would prevent interstate business from being done.

It will be observed that the defendant's answer which set up this defense had been stricken by the judge, and no exception was taken to the action striking this answer, and sustaining plaintiff's demurrer. It seems to us that this is the logical way to have raised the question.

After the demurrer to this amended answer was sustained and when the defendant offered evidence to sustain the subject-matter of that answer, it follows that there was no pleading to sustain the evidence, that answer having been stricken out of the case.

But in case the Court should consider this question upon the merits, we will now discuss it.

The blow post law of Georgia is a police regulation for the public safety. It is intended to protect travelers upon the public

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highway when that highway is crossed at grade by a railroad. Grade crossings are most perilous situations. In many States they are not allowed to exist at all, either by the public law or the railroads, building over or under. It is undoubtedly within the province of the State's police power to abolish them altogether. If it can absolutely abolish them it can certainly put any conditions it pleases upon their maintenance.

It is not every remote interference with interstate commerce which is beyond the State's powers. Nearly every law of general application affects to some extent interstate commerce. If the law is not intended primarily to affect interstate commerce, and is only a police regulation for the public health, safety or morals, a remote interference with interstate commerce has been uniformly held to be within the State's power.

The Supreme Court of the United States has passed upon many cases of alleged interference with interstate commerce by the States. It has been said in several cases that each case must be decided as it comes up, and it is difficult to lay down general rules.

It has also been stated in a number of cases that the State's power to legislate upon these subjects is only limited whenever Congress has undertaken to regulate the same subject. Whenever Congress undertakes to legislate upon a particular subject matter pertaining to interstate commerce, the State cannot legislate upon the same subject so as to interfere with the national law in any particular.

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What is known as the blow post law of Georgia is found in Secs. 2220, 2221, 2222, 2223, 2224, 2225 and 2226 of the Code of Georgia. It forms one scheme for the maintenance of public highways at grade over railroads, and for the operation of trains over the same. This Act was passed in 1852, long before any railroad now operating in Georgia acquired any franchise therein. The Georgia Railroad and Banking Company, and the Central Railroad and Banking Company, were then in existence, but are not now operating at the present time under their franchises, and lessees are in possession. Therefore, every railroad company in Georgia to-day takes its franchise and its right to operate subject to the provision of this law, which has been sustained and applied by the Supreme Court of Georgia in scores of cases.

A full history of this Act will be found in Southern Railway vs. Combs, reported in 124 Ga., p 1004. The law was passed January 22, 1852. The cause of its enactment was a horrible accident which occurred on December 14, 1851 at a road crossing in Monroe county, where a carriage containing a lady and four children, driven by a negro slave, was run into by a train of the Macon and Western Railroad Company, and two of the children and the driver killed, and the other occupants seriously injured. The cases growing out of this accident were reported in the case of Railroad vs. Davis, 18 Ga., 679; Railroad vs. Wynn, 19 Ga., 440, and Railroad vs. Wynn, 26 Ga., 250. We refer the court to the Comb's decision, so far as the literature pertaining to this Act and its history, is concerned.

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The Act required, so far as this case is concerned (first) that the whistle of the locomotive be blown continuously from a post to be located four hundred yards from the crossing until the crossing is reached; if the crossing is in an incorporated town, a continuous ringing of the bell for the same distance is substituted for the blowing of the whistle. (Second) Beginning at the blow post four hundred yards away the engineer must begin to check his train and keep checking so as to stop in time, should any person or thing be upon the crossing. He is not required to bring his train to a stop. The law does not fix any number of miles per hour as the speed at which he shall run anywhere between the blow post and the crossing. If the crossing is approached from a perfectly safe place, where there is a full view on both sides of any person or vehicle which might approach, necessarily much less checking is required to stop in time, should any person or thing be upon the crossing. If the crossing is approached from a sharp curve, where the engineer would have no chance to protect the person or vehicle upon the crossing until almost upon it, then necessarily much more checking would be required.

Is it not within the province of the State to require certain measures of diligence when going over a dangerous place like this?

The thing for the railroads to do if this law works a hardship upon them is to construct, at their own expense, underground and overhead crossings wherever practicable, and reduce the number of these grade crossings to a minimun. This would be best

both for the railroads and for the public. To maintain these grade crossings is a most dangerous undertaking and is so recognized everywhere. The time doubtless will come when if they are not maintained either under ground or overhead, that there will be gates and flagmen stationed at every crossing. Could it be doubted that the law could require that the railroads maintain a flagman at every crossing? Can it be doubted that the law could require a railroad to maintain a gate at every crossing, to be opened only when trains were not near? What is the difference in principle between a grade crossing where vehicles and pedestrains pass, and running over grade crossings with another railroad company? The law is universal that every railroad must bring its trains to a complete stop before running over another railroad track crossed at grade. No one has ever doubted the legality of this provision. Where is the difference in principle betwen a grade crossing with another railroad, and a grade crossing with a highway? There is the same danger of collision in both cases—in the one case with another railroad train, and in the other case with pedestrains or vehicles.

Inasmuch as we have only to deal with the civil side in the present case, would it not be competent for the State to enact that in every case where a railway company crosses a highway at grade, that the railway company shall pay for all damages done to persons or property upon that crossing? Laws have been sustained which absolutely make railroads liable under certain circumstances, irrespective of the question of negligence. From

a civil point of view the law in question does not forbid running over highways at full speed. It merely results in making the railway company liable in case person or property is injured there.

The law can abolish grade crossings altogether. If it allows railroad companies to maintain and keep them at all, does not the railroad company, impliedly at least, consent to every condition of the law which allows grade crossings to exist? Could not the law, as a condition of maintaining a grade crossing, exact liability of the railroad company operating at such dangerous points, for injuries occurring thereon? If a municipality can regulate the speed of a train through its limits, certainly can not the State regulate the speed of a train approaching a crossing?

It would be a huge proposition to overturn the blow post and checking laws of the several States which regulate grade crossings. This is a local matter. Each State has its own particular laws upon the subject.

An examination of the cases decided by the Supreme Court of the United States will overwhelmingly sustain this law. In Sherlock vs. Alling, 93 U. S., 99, the court says:

> "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating upon all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution."

In Smith vs. Alabama, 124 U. S., 465, the statute of Alabama requiring locomotive engineers to be examined and licensed, was

held not to be a regulation of interstate commerce, and in the third head note of the report is the following:

> "Such statute, so far as it affects transactions of commerce among the States, does so indirectly, incidentally and remotely, and not so as to burden or impede them; and in the particulars in which it touches those transactions at all it is not in conflict with any enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence."

We may remark here that Congress has not enacted any legislation applicable to interstate carriers regulating the operation of trains at grade crossings. It is manifestly one of those subjects in which the State is left free to enact its own laws.

In the case of Crutcher vs. Kentucky, 141 U. S., 47, Mr. Justice Bradley uses the following language:

> "But whilst it is only such things as are clearly injurious to the lives and health of the people that are placed beyond the commercial power of Congress' yet when that power or some other exclusive power of the federal government is not in question, the police power of the State extends to almost everything within its borders; to the suppression of nuisances; to the prohibition of manufactures deemed injurious to the public health; to prohibition of intoxicating drinks, their manufacture or sale; to the prohibition of lotteries, gambling, horse-racing or anything else that the Legislature may deem opposed to the public welfare. (Citing authorities.) It is also within the undoubted province of the State Legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in regard to the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and, generally, with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce. Such regulations

are eminently local in their character, and in the absence of congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid."

The case of Chicago, etc. R. R. vs. Solan, 169 U. S., p 133, involved the validity of an Iowa statute prohibiting contracts to exempt a railroad company from liability, as a common carrier. The railway made the claim that as to interstate carriers this was a regulation of commerce, but the Supreme Court of the United States held otherwise, and Justice Gray, on pp 137 and 138 of the decision uses the following language:

> "The rules prescribed for the construction of railroads and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits. Such are the grounds upon which it has been held to be within the power of the State to require the engineers and other persons engaged in the driving and management of all railroad trains passing through the State to submit to an examination by a local board as to their fitness for their positions; or to prescribe the mode of heating passenger cars in such trains."

In Lake Short R. R. vs. Ohio, 173 U. S., 286, a statute of Ohio which required every railroad company operating within the State to cause three of its regular passenger trains each way daily to stop at every village containing over three thousand inhabitants long

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enough to receive and let off passengers, was held to be a valid law, and not an improper regulation of interstate commerce.

In Gladson vs. Minnesota, 166 U. S., 427, it was held to be within the police power of the State to require all trains running between points within the State of Minnesota, to stop at county seats to let off and take on pasengers.

The exact question, as it occurs to us, involved in the present case, was decided in the case of Erb vs. Morasch, 177 U. S., 584, in which it was held that "a regulation by a city of the speed of railroad trains within the city limits is not, as to interstate trains, an unconstitutional regulation of interstate commerce,—at least, until Congress takes action in the matter."

In the case from which the quotation has just been taken, a regulation of Kansas City, Kansas, restricted the speed of all trains within its limits to six miles per hour. The objection there made is the identical one made in the case at bar, to-wit, that to cause the speed to slow down interfered with the rapid transit of these trains, and thus interfered with the carriage of the mails and of interstate commerce. There is not a particle of difference in principle betwen the two cases. To require a train to slow up its speed for a grade crossing no more interferes with interstate commerce than to bring it dow nto the speed of six miles in a city. If one city could pass such an ordinance all cities could pass it. There are doubtless nearly as many villages, towns and cities as grade crossings. The principle which lies at the bottom of the decisions sustaining these laws is that they are intended to pro-

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mote the public safety, and are not primarily regulations of commerce, and only affect it incidentally and remotely. In other words, as Justice Gray said in the Iowa case before cited, such regulations of the State are in aid of commerce. They make commerce safe and more advantageous to the public. The commerce which the United States wants to promote is not the commerce which takes life, or scatters pestilence, but the commerce which is reasonable, and which promotes the public safety, health and welfare. For this reason the regulations of the State which save life and health aid that commerce.

The cases cited upon the other side are not at all in point. The case of Cleveland R. R. vs. Illinois, 177 U. S., 514, held to be invalid an Illinois act which required all through interstate passenger trains to stop at every county seat, when adequate train service had already been provided for local traffic. This law of Illinois was said to be a direct burden upon interstate commerce, and justly so. The regulation attempted by the Illinois statute in this case was sheer tyranny. The railroad gave, and could be compelled, to give the county seats all the train service they required. After such train service was given, it neither aided the public health safety, commerce or convenience to require through trains to stop. Such a law was a mere attempt to fiix an arbitrary and unreasonable schedule for the railway company. It was beyond dealing with the mere question of convenience.

But it is obvious that an interstate mail train is as dangerous to life upon a public grade crossing as is a local train. There

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is nothing arbitrary or unreasonable which makes the Georgia grade crossing law apply to all trains. Any of them will take life when a colilsion occurs with a pedestrian or vehicle. It was for this reason that in the Erb case before cited the ordinance of the Kansas town limiting the speed of interstate trains, as well as intrastate trains was upheld. If the State law is to apply to any trains at grade crossings it must necessarily apply to all of them. The law applies to any train which can go at high speed and take life. It would be absurd to enact a law which would say that a local freight or passenger train shall observe certain requirements of care at a crossing and thus save life, while an interstate mail train is allowed to observe no requirements whatever, and to take life ad libitum.

In the case just cited, of Cleveland, etc. R. R. vs. Illinois, 177 U. S., 514, Justice Brown reviews all the cases where State regulation of carriers has been sustained, and all of those in which such regulations have been held invalid.

The only other cases necessary to notice, holding a State regulation of the operation of trains doing interstate comemrce invalid, is Illinois vs. Illinois C. Rwy., 163 U. S., 141, in which a State statute requiring a fast mail train carrying interstate passengers over an interstate highway, to delay the transportation of the passengers and mail, by turning aside from the direct interstate route, and running to another station on another track 3 1-2 miles away from a point on the direct route and back again to the same point because such station is a county seat, and

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where the railroad furnishes adequate accommodation for the county seat, was held to be an unconstitutional interference with interstate commerce and to the passage of the mails, and justly so. It will be observed that no question of public safety, health or morals was there involved, and the railroad had adopted by its schedules a scheme which gave the county seat in question all the trains it required, and yet gave to interstate commerce in the carriage of the mails the benefit of the highest speed obtainable betwen remote points.

In the Court below, two of the Circuit judges, Judges Pardee and Shelby, presided together with District Judge Burns, of Texas. The two Circuit judges concurred in the opinion that the statute of Georgia was a valid exercise of the police power, while District Judge Burns dissented

Judge Burns based his dissent mainly upon Central of Georgia Railway Company vs. Hall, 109 Georgia, 367; same case, 34 S. E., 605. In that case, the Supreme Court of Georgia upheld and enforced the blow post law of Georgia; but Chief Justice Simmons was merely stating his own views of the hardship of this law when he made the remark in the course of his opinion, that the statute was a hard one and that it was impossible for the railroads to transact the business of the country and obey it. He wound up his remarks upon the subject, however, by stating:

"Still, it is the law of the land and the courts must enforce it, however hardly it may work upon the business interests

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of the country if it should be observed, or upon the railroads when they violate it."

Other judges of the Supreme Court of Georgia, equally as distinguished, have enforced the law and thought it was a wise one.

Chief Justice Jackson, in the case of Brunswick and Western Railroad vs. Hoover, 74 Georgia, 428, in alluding to this law and after explaining its provisions, said:

> "Not only, therefore, is it negligence, but negligence of the grossest and gravest character, not to comply with these statutory enactments to preserve human life on the public highway, when that highway crosses the railroad track; so grave that it is made criminal not to comply with these enactments."

The blow post law was again enforced in the case of Williams vs. Southern Railway Company. 126 Georgia, 710; and again in the case of Central of Georgia Railway Company vs. North, reported in 129 Georgia, 106; and again in Western and Atlantic Railroad vs. York, 128 Georgia, 687.

We forbear to cite further cases in which this law has been enforced, and the dictum of Judge Simmons in the Hall case is the only expression of any judge which we have found in any of the Georgia cases which in any way intimates that the blow post law is a hard law.

We submit that the remarks of Judge Simmons in the Hall case, that it was impossible for the railroads to transact the business of the country and obey this law, are unwarranted and not borne out by a consideration of the Act The law does not

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require a train to absolutely stop at a crossing, but only to be in a condition of checking. In the great majority of instances there are no persons on or near the crossing, and in such cases very little checking is required. In the instance of many crossings, the view on either side of the railroad is unobstructed for quite a distance, and an engineer can readily see that he can run over the crossing without the possibility of striking any person. He is only required to have his train in a condition of checking when somebody is liable to be in danger near the crossing, and ought not the law of Georgia protect human life under such circumstances?

Judge Burns thought that the statute was valid as to domestic corporations, but unreasonable as to trains engaged in interstate commerce. We submit that the statute is entirely valid as to both classes of trains.

Respectfully submitted,

Charles H. Fle
Reuben R. Arn

Attorneys for respondent.

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

NO. 141.

SOUTHERN RAILWAY CO. Plaintiff in Error, vs. INEZ KING, by Next Friend, MRS. JOSEPHINE KING, Defendant.	IN ERROR TO THE COURT OF APPEALS OF THE FIFTH DISTRICT.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

INEZ KING, by her next friend, JOSEPHINE KING, filed her suit in the Superior Court of Habersham county, on the 24th day of September, 1904, for Fifteen Thousand ($15,000.00) dollars, against the SOUTHERN RY. CO., alleging, in substance, that, on the 20th day of September, 1903, she and her father, A. O. King, and her mother, Josephine King, were riding in a buggy and approached a crossing of the defendant Railway, at a place where they could not see the approach of a train and the train of the defendant Co., as they were crossing, ran into them.

She alleged that the Railroad was negligent in that the train was running in violation of the Statute of the State of Georgia requiring it to check and keep checking, when approaching a crossing. That she was injured, and she prayed judgment.

The Southern Railway Co., the defendant below, removed the case into the United States Circuit Court for the Eastern Division of the Northern District of Georgia.

In addition to the general answer filed, the Railway Co. filed an Amendment to its answer under an Order of the Court, in words as follows: (Page 22 of Record.)

"Now comes the Southern Railway Company, the defendant in the above stated case, and by permission of the Court first obtained, amends its answer already filed, and says plaintiff should not recover in this case for the following additional reasons:

PARAGRAPH XI.

At the time plaintiff alleges she was injured and for many years prior thereto, and now, defendant controls and operates a line of railroad from the City of Washington, D. C., through the States of Virginia, North Carolina, South Carolina, and into and through Georgia; said line forming a continuous line of railroad, the same having been formed under the Act of Congress, for the purpose of facilitating commerce among the several states, and the postal and military communications of the United States, and to that end for the purpose of carrying passengers, freight, government mails, troops and supplies from one state into another.

PARAGRAPH XII.

Defendant further shows that the train which plaintiff alleges injured her was a through train made up in the City of Washington, D. C., carrying U. S. mail, and

an express car of merchandise, and passenger coaches with passengers going from one state into another; and this defendant by said train was doing an inter-state business, under the authority and control of the Congress of the United States.

PARAGRAPH XIII.

Defendant further shows that the statute of Georgia, which is in these words, to-wit:

"There must be fixed on the line of said road, at the distance of 400 yards from the center of each of said crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof so as to stop in time should any person or thing be crossing said track on said road," the violation of which plaintiff alleges as the negligence in this case, is and was inoperative as to defendant's train, which plaintiff alleges injured her, for the reason that it is in violation of Section 8, Article First, of the Constitution of the U. S., which gives to Congress the right to "regulate commerce with foreign nations, and among the several states and with the Indian Tribes."

PARAGRAPH XIV.

Your defendant further shows that the Statute of Georgia is not a reasonable regulation of the police power of the state to secure the safety of persons, but that the Statute is a direct burden on and impedes the

inter-state traffic being done by this defendant, and impairs the usefulness of its facilities for such traffic.

PARAGRAPH XV.

Defendant further shows that it is impossible to observe said Statute and carry the mails as defendant is required to carry them under the contract it has with the government; and it is likewise impossible to do an inter-state business, and at the same time comply with the terms of said Statute.

Wherefore, it says that said Statute is inoperative as to it, and it should not be required to comply with the same on its inter-state line of railroad.

All which it stands ready to verify and prays that it be hence discharged with its reasonable cost."

The plaintiff below demurred to this amendment upon the ground that the same did not set up a defense good in law. After argument the Hon. W. T. NEWMAN, Judge, presiding, sustained the demurrer and struck the amendment. The case then went to trial.

During the progress of the case Ben Dewberry, an Engineer of the Company, was a witness on the stand and the following occurred:

"BEN DEWBERRY, stated that:

'There are between ninety and one-hundred crossings on the Southern Railway, between the South Carolina line and Atlanta."

"Plaintiff's counsel said:

'I object to that qnestion and to the answer, because

incompetent, immaterial and inadmissible. I think the entire case should be confined to this crossing.'

"Counsel for defendant then stated:

'I expect to prove that between the South Carolina line and Atlanta, there are practically one-hundred road crossings, or between eighty-five and one-hundred public road crossings; that the distance is one-hundred and one miles; that the crossings in some localities are very close together, and within a few hundred yards of each other, and at others farther apart, but on the average making a crossing to the mile almost. We expect to show further, that to observe the Statute and check and keep checking so as to have a train under control, and to stop should any person or thing be on the crossing, it would consume from five to ten minutes for each crossing dependent, of course, upon the weight and length of the train, and the grade; but it would make an average of seven or eight minutes. We wish to show that this train was made up and known as No. 39, the vestibule train which runs from the City of Washington, through the States of Virginia, North Carolina, South Carolina and Georgia; that it was carrying passengers from one state to another, also carrying an express car with freight on it, from one state to another. We wish and expect to show that obedience to that Crossing Act would hinder, and practically prevent inter-state business being done by the defendant railroad. We wish to show the condition I have just stated all existed at the time this accident occurred, on the 11th of October, 1903.'"

"By the Court:

'The testimony will be excluded, and you may have an exception noted to this ruling.'"

A verdict was rendered for the plaintiff below. Motion for New Trial was made and overruled, and the case then carried to the United States Circuit Court of Appeals, being No. 1635 of the Fifth Circuit.

On the 3d day of March, 1908, the United States Circuit Court of Appeals handed down an opinion affirming the judgment of the Court below; all of the Justices of said Court agreeing upon all the propositions in the case, except the demurrer to the amended answer above set forth, and as to this proposition two of the Justices only assenting to the opinion, the other expressing a different view. A copy of said opinion as rendered appears in Record page 112

A petition was made by the Southern Railway Co. for a Writ of Certiorari, which was granted on May 21, 1908. (Page 121 of Record.)

THE QUESTIONS INVOLVED AND HOW RAISED.

Thus, one question is made, namely: whether or not the Blow post Statute of Georgia, above set out, infringes upon the Commerce Clause of the Federal Constitution. The question was raised, first, by the amended answer, and, second, by the evidence tendered by Dewberry, being first raised by pleading and then by evidence.

POOR

SPECIFICATION OF ERRORS RELIED UPON.

The errors relied upon are:

1. Striking the amended answer.

2. Rejecting the evidence of Dewberry.

3. Holding the Blow post Statute of Georgia does not contravene the Commerce Clause of the Federal Constitution.

BRIEF.

I.

CONSTITUTIONAL QUESTION PROPERLY MADE.

1. The amendment filed by the defendant below alleging that the following Statute of Ga. known as the Blow Post Statute, to-wit: "There must be fixed on the line of said roads, and at a distance of four hundred (400) yards from the center of each such road crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road." is void because a burden upon Interstate commerce was in proper form and conformed to the laws of Georgia on the subject and properly raised the constitutional question mentioned therein.

S. F. & W. Ry. vs. Hardin, 110 Ga. 433.
Brown vs. State, 114 Ga. 60.
Sayor vs. Brown, 119 Ga. 542.

2. When a constitutional question is not made or passed upon in the law Court, the Court of Review will

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not consider it, though afterward argued there. The reverse of the proposition is likewise true.

Butler vs. Merritt, 113 Ga. 241.
Lafitte vs. Burke, 113 Ga. 1000.
State vs. Henderson, 120 Ga. 781.
Newkirk vs. Sou. Ry. Co., 120 Ga. 1048.
Parkham vs. Potts Thompson Liquor Co. 127 Ga. 303.

3. Amendments to pleadings are authorized by Sections 5097 and 5098 of the Code of Ga. which are as follows: Sec. 5097. "All parties, whether plaintiffs or defendants, in the Superior or other Courts, whether at law or in equity, may, at any stage of the cause, as matter of right, amend their pleadings in all respects, whether in matter of form or of substance, provided there is enough in the pleadings to amend by. The defendant, after the first term, cannot set up new matter by way of amendment, except as provided in Section 5057."

Section 5098. "A petition showing a plaintiff, and a defendant, and setting out sufficient to indicate and specify some particular fact or transaction, as a cause of action, is enough to amend by. The jurisdiction of the Court may be shown and the details and circumstances of the particular transaction may be amplified and varied by amendment. If the declaration omit to allege facts, essential to raise the duty or obligation involved in the cause of action which was evidently originally intended to be declared upon, the omitted fact may be supplied by amendment."

Ellison vs. G. F. R., 87 Ga. 691.
Eagle Phoenix Mills vs. Muscogee Mfg. Co., 129 Ga. 715.

The same rule of amendments applies to the defendant's answer, except as to affidavit required by Section 5057 of the Code.

Roundtree vs. Rutherford, 65 Ga. 447.
Winn vs. Winn, 109 Ga. 255.

The section 5057 referred to as amended, is as follows: "The defendant, after the time allowed for answer has expired, shall not, in any case, by amendment set up any new facts or defense of which notice was not given by the original plea or answer, unless at the time of filing such amended plea or answer containing the new matter, he shall attach an affidavit that, at the time of filing the original plea or answer, he did not omit the facts or defense set out in the amended plea or answer, for the purpose of delay and that the amendment is not now offered for delay, or unless in the discretion of the Court the circumstances of the case or substantial justice between the parties require that such amendment be allowed without attaching such affidavit."

Acts of 1897, Page 35.

If the proper affidavit is attached, the Judge has no discretion but must allow the amendment.

The Judge in his discretion may allow the amendment without affidavit.

Marsh vs. Hicks, 110 Ga. 888.

The absence of the defendant is a reason for allowing the amendment without affidavit.

Boss vs. Guarantee City Co., 119 Ga. 127.

An attorney may make an affidavit.

Paullain vs. Pigg, 66 Ga. 263.

Any agent may make the affidavit.

Code 3035.

The Act, itself, does not provide who shall make the affidavit, but simply says: "Shall attach an affidavit."

II.

The evidence of Dewberry, offered and rejected by the Court, properly raised the constitutional question. All that is required by the laws of Ga. is that the question shall be raised below, and be passed on directly or indirectly and appear in the Record either in the pleadings, or the evidence, or other parts of the record.

Parker vs. Potts Thompson Liquor Co., 127 Ga. 303.
S. F. & W. Ry. Co. vs. Hardin, 110 Ga. 433.
Newman vs. State, 101 Ga. 534.
Lafitte vs. Burke, 118 Ga. 1001.

The objections to the evidence of Dewberry were not upon the ground that there was no pleading authorizing it. Under the law of Ga. all objections to evidence not made are waived.

Jackson vs. State, 88 Ga. 784.
Steed vs. Cruise, 70 Ga. 168.
Christian vs. State, 86 Ga. 430.
Rhinehart vs. Blackshear 105 Ga. 799.
Summers vs. State, 116 Ga. 535.

III.

Commerce among the States consists, among other things, in intercourse and traffic, including in these terms the transportation and transit of persons and property and the instrumentalities thereof.

County of Mobile vs. Kimball, 102 U. S. 691, (26 L. E. 238.)
McCall vs. Calif, 136 U. S. 104 (34 L. E. 391.)
Williams vs. Fears, 179 U. S. 270 (45 L. E. 186.)
Champion vs. Ames, 188 U. S. 321 (47 L. E. 136)

IV.

THE RESERVE POWER OF THE STATES.

There is no reserve power in the States to, in any way, regulate inter-state commerce. Where the apparent exercise of power has been upheld by the Courts, the power was either the mere declaration of a common law duty as applied to the instrumentalities of inter-state commerce or the exercise of some other reserved power not pertaining to commerce.

Cooke on Commerce Clause of Federal Constitution, pages 111 to 124, inclusive.

Western Union Tel. Co. vs. Call Pub. Co., 181 U. S. 92. (45 L. E. 765.)

Elliott on R. R. Vol. 3, page 1156.

V.

POLICE POWER OF THE STATE.

If the authority to regulate an interstate railroad train at a public crossing is embraced in the police power of a State, that authority must be so exercised as not to *burden* or *impede* the interstate traffic of the company, or *impair* the *usefulness* of its *facilities* for the traffic. "The police power of a State is not unlimited and is subject to judicial review, and when exercised in an arbitrary or oppressive manner, such laws may be annulled as violative of the rights protected by the constitution.

Ill. Cent. R. R. vs. Ill., 163 U. S. 154.

L. S. & M. S. R. R. vs. State of Ohio, 173 U. S. 285.

(Dissenting opinion and authorities cited on pages 309 and 335.)

Cleveland & Chicago R. R. vs. St. Louis R. R. 177 ~~107~~ U. S. 514.

Miss. R. R. Commission, vs. Ill. Cent. 203 U. S. 335.

Atlantic Coast Line vs. N. C. Commission, 206 U. S. 1.

Morgan Steamship Co. vs ————————, 118 U. S. 455.

Jacobson vs. Mass. 197 U. S. 25.

Lawler vs. Steele, 152 U. S. 133.

Henderson vs. N. Y., 92 U. S. 259.

Lockner vs. N. Y., 198 U. S. 45.

Holden vs. Hardy, 164 U. S. 366.

Connelly vs. Union Sewer-pipe Co., 184 U. S. 540.

Gibbs vs. Ogden, 9th Wheat, 1 and 210.

Sennot vs. Davenport, 22 Howard, 227.

Mo. Ry. Co. vs. Harber, 169 U. S. 613.

Dobbins vs Los Angeles, 195 U. S. 223.

McLean vs. Ark., 211 U. S. 547.

"Commerce with foreign nations and between the states, which consists in transportation of persons or property between them, is a subject of national character and requires uniformity of regulation. Congress, alone, can deal with such transportation and its non-action is a declaration that it shall remain free from burdens imposed by State legislation."

Gloucester Ferry Co. vs. Penn., 114 U. S. 196, (29 L. E. 158.)

"Although it is expressly provided that the power of Congress to regulate shall be exclusive, it is obvious that in order to be effective, the exercise thereof must exclude the exercise of any conflicting power under authority of the State; inconsistent State legislation being to that extent superseded."

Cooke on Commerce Clause of Federal Constitution, page 109.

County of Mobile vs. Kimball, 102 U. S. 691. (26 L. E. 238.)

Leisy vs. Hardin, 135 U. S. 100. (34 L. E. 128.)

It is said with reference to the police power of a State that, "no definition of it, and no urgency for its use, can authorize a State to exercise it in regard to a subject matter which has been confided to the discretion of Congress, by the Constitution, but nothing is gained in the argument by calling it the police power."

Henderson vs. Mayor of N. Y. 92 U. S. 259 (23 L. E. 543.)

"Local enactment or regulation, even if based upon the acknowledged police power of a State must always yield in case of conflict with the exercise by the general Government of any power it possesses under the Constitution, or any right that instrument gives or secures."

Jacobson vs. Mass. 197 U. S. 25, (49 L. E. 649.)

"In general terms it may be said, that Federal control of commerce begins as soon as the subjects or operations of commerce are subjected to burdensome State legislation."

Prentice & Eagan on Commerce Clause of Federal Constitution, Page 61.
Walling vs. Michigan 110 U. S. 446.
Robinson vs. Taxing District, 124 U. S. 489.
Asher vs. Texas 128 U. S. 129.
McCall vs. Calif, 139 U. S. 104.
Brennan vs. City of Titusville, 153 U. S. 289.

VI.

The Statute under review is unconstitutional and void as to Inter-state railroads, for the following reasons:

1. There is no common law duty on a carrier to check its trains at a crossing, so as to stop if any per-

son or thing should be thereon, and there is no reserve power in a State to impose such burden on an Inter-state carrier.

2. The Act as applied to through trains is unreasonable. "The reasonableness or unreasonableness of a State enactment in a given case will determine whether or not the same is a proper exercise of police power."

L. S. & M. S. R. R. Co. vs. State of Ohio, 173 U. S. 301.

3. The Act in effect is to regulate an Inter-state carrier, and, thus, Inter-state commerce. "So long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its own will that such commerce shall be free and untrammeled, and any regulation of the subject by the State is repugnant to such freedom."

Brown vs. Houston, 114 U. S. 622 (29 L. E. 257.)
Welling vs. Mo., 91 U. S. 275 (23 L. E. 471.)
Transportation Co. vs. Parkersburg, 107 U. S. 691 (27 L. E. 584.)

To regulate is defined: "To adjust by rule, method, or established mode; to direct by rule, or restriction; to subject to governing principles or laws." (Webster's International Dictionary.)

4. The effect of the Statute is to burden, impede, and to impair the usefulness of the facilities of Inter-state carriers for such traffic.

Ill. Cent. R. R. Co. vs. Ill., 163 U. S. 154.
Miss. R. R. Commission vs. Ill. Cent., 203 U. S. 346.

5. The Statute is not observed, and the engineers are not prosecuted for its violation, though the Statute so requires.

Penal Code of Ga., Section 517, provides: "If any engineer fails to blow the whistle and to check the speed as required, by Section 2222 of the Civil Code, he shall be punished as for a misdemeanor."

6. The Statute was passed before the days of Inter-state railroads; it was enacted by the State for the railroads of the State as they were then operated. Inter-state carriers operate by virtue of an Act of Congress passed since the day of the Ga. Statute, and which had the effect to supersede the Blow post Statute of Ga.

U. S. Revised Statutes, Par. 5258.

The evolution of the business world has rendered obsolete the Statute under review.

VII.

THE GA. DECISION OF THE QUESTION.

The constitutionality of the Ga. Statute under consideration has never been passed on by the Supreme Court of Ga. until recently, in the case of the Sou. Ry. Co. vs. Grizzle, reported in the 131st Ga. Page 287. That decision is a mere head-note decision. The only part of it bearing on the question is the first head-note, which is in these words: "The provision of the Civil Code Section 2222, requiring the engineer of a locomotive to check the speed thereof on approaching a public crossing, so as to stop in time should any person or thing be crossing, is not, with respect to a railroad company doing an Inter-state business, violative of Section 8, Article 1, of the Constitution of the United States, as being a regulation of Inter-state commerce, but is a

police regulation designed to secure the public safety, and is valid, as such.

Hennington vs. State, 90 Ga. 396. (17 S. E. 1009.)

Seale vs. State, 126 Ga. 644, (55 S. E. 472.)

Hennington vs. Ga. 163 U. S. 299, (16 Sup. Court, 1086, 41 L. E. 166.)

The Court committed no error in refusing to allow an amendment offered by the defendant railroad Co., in this case, alleging that the Code Section above cited was void because of being violative of the provisions of the Constitution of the United States above referred to, and that the failure to comply with the requirements of such Code Section by the defendant company, in the operation of one of its trains then engaged in doing an Inter-state business, could not lawfully be attributed to it as negligence."

This decision is predicated upon the case of Hennington vs. State of Ga., 163 U. S. 299. The Hennington case is of doubtful soundness. Mr. Justice Brewer took no part in the decision. The Chief Justice and Mr. Justice White dissented. The decision has since been criticised by Mr. Justice Shiras, in the case of L. S. & M. S. R. R. vs. State of Ohio. 173 U. S. 296, in words as follows: "If, as has often been said, Christianity is part of the common law of the several States, and if the U. S. in their legislative and executive departments throughout the country, since the foundation of the Government, have recognized Sunday as a day of rest and freedom from compulsory labor, then such a law as that of Ga., being based upon a public policy common to all the States, might be sustained; but, if put upon a ground now declared in the opinion of the Court in the present case, namely, as an exercise of the police power of the State, and, as such, paramount to the control of Congress in administering the commerce clause of the Con-

stitution, then it is apparent, as I think, that the decision in Hennington vs. Ga. was wrong, and the Judges dissenting in that case were right.

If, as a matter of local policy, one State may forbid Inter-state trains from running on the Christian Sabbath, an adjoining State may select a Jewish or Seventh Day Sabbath, as the day exempt from business. Another State may choose to consecrate another day of the week in commemoration of the Latter Day Saint and Prophet who founded such State, as the proper day for cessation from daily labor. Or, what is more probable, one or more of the States may think fit to declare that one day in seven is not a sufficient portion of the time that should be exempt from labor, and establish two or more days of rest. The destructive effect of such inconsistent and diverse legislation upon Inter-state commerce, carried on in trains running throughout the entire country, is too obvious to require statement or illustration."

The case has, in effect, been over-ruled by the more recent cases cited on the brief. There is no other Statute in existence like the one under review and hence no direct authority.

The Hennington case was dealing with a Statute of Ga. which requires all freight trains not to run after (8) o'clock on Sunday morning until twelve (12) o'clock that night, with certain exceptions specified. The difference between requiring the freight trains to stop running a part of one day in the week, and requiring all trains to stop at every crossing every day in the week is marked.

If the Hennington case is sound as to the Statute it was dealing with, it is not authority for upholding a Statute which both regulates and burdens commerce.

VIII.

Adjudicated cases of this court are all in line of our contention. The decision of this case by the Court of Appeals was based on a misconception of Gladson vs. Minnesota, 166 U. S. 430.

ARGUMENT.

I.

FEDERAL QUESTION PROPERLY MADE.

It is conceded that a Federal question was made. Was it properly raised?

1. Under Section 914 of the Revised Statutes of the United States, it is provided that the practices, pleadings, forms, and modes of proceeding in Civil causes, other than Equity and Admiralty causes in the Circuit and District Courts, shall conform as nearly as may be to the practices, pleadings, forms, and modes of proceeding existing at the time in like causes in the Court of Record of the State in which such Circuit and District Courts are held. This cause having been tried in the Circuit Court being held in Georgia, we must look to the law of that State as to the mode of raising such questions. The rule under the Georgia law is that, in order for a Court of Review to pass upon the constitutionality of an Act of the Legislature, the Act must be brought into question in the Trial Court and passed on by the Judge thereof, either directly or by implication. It must appear in the record that the question was before the Trial Judge and he passed on it, or should have passed on it.

Savannah, Fla. & Western Ry. Co. vs. Hardin, 110 Ga. 433.
Brown vs. State, 114 Ga. 60.
Sayr vs. Brown, 119 Ga. 542.

2. When a constitutional question is not made or

passed upon in the lower Court, the Court of Review will not consider it, though afterwards argued there. The reverse of the proposition is also true.

Butler vs. Merritt, 113 Ga. 241.
Lafitte, et al vs. Burke, 113 Ga. 1000.
State vs. Henderson, 120 Ga. 781.
Newkirk vs. Southern Ry. Co., 120 Ga. 1048.
Parham & Co. vs. Potts-Thompson Liquor Co., 127 Ga. 303.

These cases comprise all the recent expressions of the Supreme Court of Georgia on the subject. The Amendment filed by the defendant and already set out, it will be seen, contains none of the defects mentioned in these cases. It sets out the Georgia Statute, of which it complains, and the clauses of the Federal Constitution which, it is alleged, it contravenes, and why.

3. If the Amendment, filed and stricken, was germane and in proper form, the question was probably made. The law of Amendment to pleadings in Georgia is exceedingly liberal. Either plaintiff or defendant may amend at any stage of the case, in form or substance, if there is anything to amend by. In the case at Bar, the defendant had filed an answer at the first Term, denying the allegations of plaintiff as to liability which was the general issue in effect. The Code of Georgia, of 1895, Section 5097, on the subject of Amendment, provides: "All parties, whether plaintiffs or defendants, in the Superior or other Courts, whether at law or in Equity, may, at any stage of the cause, as matter of right, amend their pleadings in all respects, whether in matter of form or of substance, provided

there is enough in the pleadings to amend by. The defendant, after the first Term, cannot set up new matter by way of Amendment, except as provided in Section 5057."

The Code, Sec. 5098, has undertaken to codify the principle announced in a number of decisions, including the case of Ellison vs. Georgia, Florida, Ry. Co., 87 Ga., 691, and is in these words:

"A petition showing a plaintiff, and a defendant, and setting out sufficient to indicate and specify some particular fact or transaction as a cause of action, is enough to amend by. The jurisdiction of the Court may be shown, and the details and circumstances of the particular transaction may be amplified and varied by Amendment. If the declaration omit to allege facts essential to raise the duty or obligation involved in the cause of action which was evidently intended to be declared upon, the omitted fact may be supplied by Amendment."

See also Eagle & Phoenix Mills vs. Muscogee Mfg. Co., 129 Ga. 715.

The same rule applies to Amendments by the defendant, as to his plea or answer, that applies to the plaintiff.

Roundtree vs. Rutherford, 65 Ga., 447.
Winn vs. Winn, 109 Ga., 255.

The only difference between an Amendment filed by the plaintiff and that filed by the defendant is the requirements of the Statutes as to an affidavit. The Code of Georgia of 1895, Section 5057, as amended by the Acts of 1897, Page 35, is as follows: "The defendant, after the time allowed for answer has expired, shall not, in any case, by Amendment, set up any new

facts or defense, of which notice was not given by the original plea or answer, unless at the time of filing such amended plea or answer containing the new matter, he shall attach an affidavit that, at the time of filing the original plea or answer, he did not omit the new facts or defense set out in the amended plea or answer for the purpose of delay; or unless, in the discretion of the Court, the circumstances of the case or substantial justice between the parties require that such Amendment be allowed without attaching an affidavit."

If the proper affidavit is attached, the Judge has no discretion, but must allow the Amendment.

Winn vs. Winn, 109 Ga. 256.
Ala. Midland Ry. vs. Guilford, 114 Ga. 628.

The Judge, in his discretion, may allow the Amendment without affidavit.

Marsh vs. Hicks, 110 Ga. 888.

The absence of the client is a reason for allowing the Amendment without an affidavit.

Boss vs. Guarantee City Co., 119 Ga. 127.

In this case, however, the affidavit was, in fact, made to the Amendment by the Counsel in charge of the case. (See Page 29 of the Record.) It will be observed that the Statute does not require an affidavit to be made by the defendant, but merely an affidavit.

In this instance it was done by the person who best knew the facts. In Georgia, an attorney may make an affidavit to an Amendment, or, indeed, to any pleading,

for a defendant who resides out of the County where the case is being tried.

Paullain vs. Pigg, 66 Ga., 263.

An Agent may make an affidavit. Code of Ga. 1895, Section 3035.

The Demurrer to the amended answer was upon the ground that it did not set up a legal defense and, therefore, necessarily waived any question as to form.

II.

QUESTION RAISED BY EVIDENCE.

The question was again raised by the evidence of Dewberry, as to the number of crossings between the South Carolina Line and Atlanta, and the time it would take to observe the Statute. (See Page 22 of the Record.)

The Court of Appeals in deciding this case, held that the tender of this evidence did not again raise the question. The learned Judge, in speaking of this evidence, says: "The only object and avowed purpose of tendering this testimony was to show the invalidity of the Statute, in so far as it related to trains engaged in Interstate traffic, and this, without special plea, would not be permissible under the practice and pleading obtaining in Georgia.

* * * * * *

The validity or invalidity of a Statute cannot be considered upon Appeal, unless the Record shows that the question was distinctly raised in the pleadings in the Court below."

The two cases cited by the learned Judge in support of the propositions are those of Parham & Co. vs. Potts-Thompson Liquor Co., reported 127 Ga. 303, and the case of the Savannah, Fla., & Western Ry. Co. vs. Hardin, 110 Ga. 433. The Parham & Co. case is a head-note decision, and the only reference to the question under consideration is in the first head-note, which is in these words: "An averment in a pleading that a named Statute is unconstitutional and void, is too vague and indefinite to raise any question for determination." This does not deal with the proposition as to how the question shall be raised but simply decides what is not a sufficient raising. The case of the Savannah, Fla., & Western Ry. Co. is dealing solely with the question as to whether or not the constitutionality of the Statute may be brought in question by Demurrer. The learned Judge who wrote that opinion was on the Bench and wrote the opinion in the case of Newman vs. State, 101 Ga. Page 534. In that opinion he used this language: "Under a general Demurrer, the constitutionality of the law under which the accused was arraigned was brought in question."

This evidently was going too far. Indeed, the same learned Judge writing the opinion as wrote the opinion in the Newman case, in the course of his argument, uses this expression: "These statements in the Bill of Exceptions will not be sufficient to raise the question when the Record shows that the question was not distinctly raised in the pleadings in the Court below." In that case, the only way it could have been raised was by the pleadings.

Counsel was insisting that the general Demurrer without more, had sufficiently raised it, and that statements in the Bill of Exceptions saved it. It was with this question the Judge was dealing and, while it is authority, to the effect that a constitutional question cannot be raised by a general Demurrer which makes no reference to the question, it is, by no means, exhaustive nor authority that the question cannot be raised except by pleading.

As an evidence that the learned Judge did not mean to confine an attack upon a legislative Act to the pleading, I quote from the decision rendered by the same Judge in the case of Lafitte vs. Burke, 113 Ga., page 1001, as follows: "No Court should ever pass upon the constitutionality of a Legislative Act, unless the *Record* indicates clearly, and specifically points out the reason why the Act is claimed to be unconstitutional." The word *Record* is broader and not only embraces the pleading but anything that might happen in the case.

Under the Georgia practice a plaintiff files no pleading except his declaration, but if the defendant should set up a defense by virtue of an unconstitutional Statute, a plaintiff would attack the same by oral Demurrer, or by objecting to evidence. The case would go to the Supreme Court with these facts appearing in the Bill of Exceptions, or in the Record made up, and the rules of the law would be complied with. If it were true that the unconstitutionality of an Act could not be brought in question, except by pleading, it would follow that in Georgia a plaintiff could never question an Act relied

on by the defendant. It is necessary that the question be raised in some legitimate way and passed on by the Trial Judge, and that this fact appear, before the record of it can be reviewed by the Appellate Court. There is no reason why this cannot be done as well by the Demurrer to evidence as any other way.

The only thing decided in the Savannah, Fla. Ry. case, above noted, is embraced in the first head-note, and is in these words:

"When a record brought to this court contains nothing from which it could even be inferred that any question of the constitutionality of a particular Statute upon which the plaintiff's action was based, was at any stage of the case made in the Trial Court, or that such Court, in any manner, undertook to pass upon such a question, the mere fact that the Bill of Exceptions assigns error upon a refusal to sustain a general Demurrer to the petition and dismiss the action, and also upon the over-ruling of the motion for a new trial containing a ground alleging that the verdict was contrary to law, does not properly raise here any question upon the constitutionality of such Statute; and this is so, though the Bill of Exceptions does in general terms state that the above indicated rulings were erroneous because that Statute was "class legislation and special legislation and obnoxious to the Constitution of the State, and therefore void' and requires 'impossibilities and puts as a penalty the value of the goods lost, and takes the property of defendant without any just compensation therefor, and, therefore, amounts to confiscation which is unconstitutional and void."

While a private conversation does not amount to authority, yet it is at least permissible to state that Judge Cobb, who delivered these opinions, states now that he

did not intend to hold that the only way a constitutional question could be raised was by the pleading.

The evidence, when offered, was not objected to on the ground that there was no pleading to sustain it. The objection was (See page 22) : "I object to that question and to the answer, because indefinite, immaterial, and inadmissible. I think the entire case should be confined to these crossings."

It is a well settled rule under the Georgia practice, that all objections to evidence, not made, are waived. The objection must be made at the time the evidence is offered and the grounds thereof stated.

Jackson vs. State, 88 Ga., 784.
Steed vs. Cruise, 70 Ga., 168.
Christian vs. State, 86 Ga., 430.
Reinhart vs. Blackshear, 105 Ga., 799.
Summers vs. State, 116 Ga., 535.

Thus, as the question was presented to the Trial Judge, as to whether or not the evidence was admissible, it was the same as if pleading was then of file, authorizing the evidence, and in excluding the evidence, the Judge was passing upon a question as to whether or not the Blow Post Statute was constitutional. An exception was allowed to the Judge's ruling, and it became part of the Record, and under the ruling made by the Supreme Court of Ga. in the cases above cited, the question was proper to be considered by the Court of Review.

We insist, therefore, that the Federal question was made in the two ways mentioned. The Trial Judge in his charge to the jury, recognized that the question had

been made by the evidence when he charged the jury as follows: "Under the Statute of Georgia, Gentlemen, which has been referred to, it is the duty of the engineer of trains in Georgia, when approaching a crossing, to blow the whistle as has been stated by you, and to check and keep checking their trains as they approach the crossing, so as to be able to stop them, if any person or thing should be upon the crossing. That is the Statute of this State, and it is entirely clear that they were not doing that in this case, so there is no question that the Railroad, through its servants, and employes, was guilty of negligence.

I, therefore, charge you, as a matter of law, that the defendant, through its servants, Agents and employes, was guilty of negligence."

III.

COMMERCE, WHAT IS.

That an Inter-state railroad carrying passengers, mail and express, is an instrumentality of commerce and protected by the commerce clause of the constitution is too well established by the authorities cited on the brief, as well as others, to admit a question. Whatever rule applies therefore to Inter-state commerce, under the law, applied to the train of the railroad company being run at the time the injury under consideration occurred.

IV.

THE APPARENT LEGAL EFFECT UPON INTER-STATE COMMERCE IS BY VIRTUE OF SOME OTHER RESERVE POWER.

While under the police powers reserved in the states, and giving the states the authority to enact such laws

as may be necessary for the protection of the public morals, public health, and public safety, these powers must be exercised so as not to affect Inter-state commerce or the instrumentalities thereof; otherwise, they are void.

The right to regulate commerce cannot exist both in a state and in the Federal Government. When the right was ceded to the Federal Government the whole right and not a part thereof was so ceded. The only thing reserved by the state in so far as commerce and its instrumentalities are concerned is the right to enforce the common law duties imposed upon such instrumentalities of commerce. While there is no common law of the United States, yet in most of the States, it exists. The duty imposed by common law on a carrier whether Inter-state or Intra-state, must be performed, and a State can enforce that performance. In each instance where a State Statute apparently affecting the instrumentalities of Inter-state commerce has been upheld by this court, such Statute was merely declaratory of the common law duty owed by the railroad.

Mr. Elliot in his work on Railroads, Vol. 3, page 1156, in discussing the common law duties of a railroad company at crossings, says: "The company must exercise reasonable care to provide sufficient men and proper appliances for the control of the train; must when necessary provide suitable warnings of danger at highway crossings, and on the approach of trains to crossings, warnings must be given which will apprise the traveler in the use of ordinary care, of the danger of the situation. The signals must be given at such a time and the

speed of the train so regulated that the warning may be effectual to the traveler to whom the duty is due."

This common law duty to give notice of the approach of the crossing may be declared by Statute, that is to say, a State may declare what will constitute a compliance with this common law duty; and hence that part of the Statute under consideration which requires the whistle to blow four hundred yards before reaching the crossings, is a mere statutory declaration of what shall constitute a compliance with a common law duty.

It is likewise a common law duty of a carrier to exercise ordinary care in passing populous localities and to regulate the speed of the train accordingly. It is therefore within this power for the States to provide the speed of the trains through cities. This is a mere statutory declaration of what shall be a compliance with the common law duty of running at a safe speed through places frequented by the public.

It is likewise a common law duty for carriers to stop sufficient trains at the various stations to accommodate the traveling and shipping public, and hence the Statute requiring three trains each day to stop at towns having a population of three thousand, is a mere statutory declaration of what is a compliance with this common law duty.

In other words, wherever there is a common law duty of a carrier, the State may prescribe what shall be a compliance with that duty, but when it imposes a duty not embraced in those under the common law, in so far

as it affects the instrumentalities of Inter-state commerce, the same is void.

There is nothing under the common law requiring a carrier to stop its trains at road crossings. When the State of Georgia undertakes to require an Inter-state train to stop at each crossing, regardless as to whether or not there are persons thereon, it is dealing with a duty not imposed under the common law, a right therefore not reserved in the State.

Under the common law, the duty is on the traveler to look and listen for the approach of a train before crossing. The Statute under consideration reverses the rule and in effect requires the railroad to look and listen and to stop.

Under the Statute, the traveler is not required to stop, but he may proceed on his way, and the train must stop until he passes.

Mr. Cooke in his work on Commerce Clause of the Federal Constitution, Pages 112 to 124, inclusive, lays down the rule as above stated and among other things says:

"When it is apparent that a State is regulating Commerce, the power being exercised is derived from some other authority, which power has been reserved in the State. Assuming then as well established, the rule that, under certain conditions at least, the power of Congress to regulate is exclusive of any exercise of such power under authority of a State, even in the absence of exercise of the power by Congress, there arises the question whether it is not exclusive *in all cases*. We submit that it is, and for a time, at least, such view obtained some counte-

nance. That is to say, in this view, strictly speaking *in no case can Commerce within the scope of the Commerce clause be regulated under authority of a State.* It is true indeed, that action taken under authority of a State may effect such Commerce, but we submit that *in every case this is merely the incidental result of the exercise under authority of a State, not of the power to regulate Commerce but of some other distinct power reserved to the States* 'All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from *distinct powers*; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.' We shall endeavor hereafter to demonstrate the application of this principle in detail; an illustration will suffice here. Either Congress or a State may take action with reference to the transportation of diseased live-stock from State to State, and in their outward aspect there may be no distinction between action in one case and in the other. But Congress is *directly regulating the transportation of such live-stock*; the State is *directly regulating the sale* thereof, within its limits, prohibition of such transportation from State to State, being merely an essential incident of the regulation of sale within the State.

It must be admitted, and will, indeed, hereafter be seen that there are decisions of the Supreme Court not in harmony with the distinction just stated, but it would seem to us to be better to regard them as departures from sound principle than to manufacture a new and arbitrary distinction for the purpose of explaining them." (Cooke on the Commerce Clause, Pages 111-113, inclusive.) (See, also, Pages 113-124, Cooke."

"The principles of the common law are operative upon all Inter-state commercial transactions, except as

far as they are modified by Congressional enactment." Western Union Tel. Co. vs. Call Pub. Co., 181 U. S. 92 (45 L. E. 765.)

V.

THE POLICE POWER OF A STATE.

If the authority to enact the Statute under consideration was reserved in Georgia by virtue of its police powers, still, this power is not unlimited, and is subject to judicial review, and when exercised in an arbitrary or oppressive manner, such law may be annulled as violative of the rights protected by the Federal Constitution.

In the case of Jacobson vs. Massachusetts, 197 U. S., page 25, Mr. Justice Harlan delivering the opinion, uses this language: "A local enactment or regulation even if based on the police powers of a State, must always yield in case of conflict with the exercise by the Government of any power it possesses under the Constitution, or with any right which that instrument gives or secures."

In the case of Lawton vs. Steel, 152 U. S., 133, the court uses this language: "The extent and limits of what is known as the police power have been a fruitful subject of discussion in the Appellate Courts of nearly every State in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance * * * * To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a

particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive but is subject to the supervision of the courts."

Henderson vs. New York, 92 U. S., 259.

In the case of Lochner vs. New York, 198 U. S., 45, in discussing a New York Statute limiting he hours of labor of employes in bakeries, etc., this language is used. "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be * * * In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty etc. * * * This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it

within the police power of the State? And that question must be answered by the court."

In the case of Holden vs. Hardy, 169 U. S., 366, the rule is stated: "The question in each case is whether the legislature has adopted the Statute in the exercise of a reasonable discretion or whether its action be a mere excuse for an unjust discrimination or the oppression or spoliation of a particular class."

In the case of Connolly vs. Union Sewer Pipe Company, 184 U. S., 540, Mr. Justice Harlan delivering the opinion, uses this language: "The question of constitutional law to which we have referred cannot be disposed of by saying that the Statute in question may be referred to what are called the police powers of the State, which, as often stated by this Court, were not included in the grants of power to the general government, and therefore reserved to the States when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the constitution or Statutes of the States to the contrary notwithstanding, a Statute of a law, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a State enactment, whatever may be the course from which the power to pass such enactment may have been derived. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the Supreme law. The State has undoubtedly the power, by appropriate legislation, to protect the morals, the public health and the public safety, but if, by their necessary operations, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

Gibbons vs. Ogden, 9 Wheat 1, 210; Sennot vs. Davenport, 22 How. 227; Missouri, etc. Railroad Company vs. Haber, 169 U. S., 613

In the case of Dobbins vs. Los Angeles, 195 U. S., 223, the rule is thus stated: "But the exercise of the police power is subject to judicial review and property rights cannot be wrongfully destroyed by arbitrary enactment."

In the case of McLean vs. Arkansas, 211 U. S., 547, the doctrine is thus stated: "The police power of the State is not unlimited and is subject to judicial review, and when exercised in an arbitrary or oppressive manner, such laws may be annulled as violative of the rights protected by the Constitution."

The same principle has been announced in a number of other cases, but these are sufficient to establish the proposition that granting the Statute under consideration is within the police powers and the reserved right of the State of Georgia, yet if the Statute at the same time is oppressive or is unreasonable or is a burden upon the rights granted under the Federal Constitution, the same shall be declared void.

Assuming the rule to be that any act of a State whether direct or otherwise has the effect to materially interfere with Inter-state commerce, this Court will declare the same void; what are the facts as applied to the case under review? The demurrer filed to the amended answer admitted everything alleged therein; among the rest, it admitted that it was impossible to do an Inter-state business and at the same time comply with the terms of the Statute under review. This being admitted,

it would seem to follow that under the authorities the Statute could not be upheld as applicable to Inter-state commerce.

From the Record it is apparent that from the S. C. line where the train reached the Ga. line to Atlanta, was a distance of about one-hundred (100) miles with an average of a crossing to the mile. That it would take an average of seven (7) minutes to the crossing to observe the statute under review, or seven hundred (700) minutes for that journey. The schedule time for that train from the S. C. line to Atlanta, was about three (3) hours and a half, or the total time to run a train one hundred (100) miles under the Statute would be fifteen (15) hours, making an average of a little over six miles per hour. This Statute, in effect, therefore, requires an Inter-state railroad to run its trains in Ga. at a speed of six (6) miles per hour. If the Statute under review had enacted in so many words that a train should not run in Ga. beyond six (6) miles per hour, I take it that this Court would not hesitate to declare the same an unreasonable exercise of the police power of the State. It has been frequently held by this Court, and the doctrine reiterated in the case of the railroad commissioners of N. C. cited on the brief, that any exercise of state authority in whatever form manifested which directly regulates, or the necessary effect of which is to regulate Inter-state commerce, is void. (See also Atlantic Coast Line R. R. Co. vs. S. C. Commission decided Dec. 9, 1907.)

If, therefore, the State could not regulate the speed of an Inter-state train by reducing it to six (6) miles an hour, and I think that will be conceded, I submit that a Statute which has that effect, likewise cannot be sustained under the police power of the State.

It is claimed that the Statute under consideration was enacted for the public safety, under the reserve power of the State to enact such laws as may be necessary for the safety of the public. When analyzed, it will be seen that it does not apply to the whole public; it is only to that small per cent of the public that may use the road crossings. It does not apply to all those, in fact, but simply to that per cent of persons traveling upon the dirt road who violate the duty imposed on them by the common law of looking and listening before crossing a railroad track. This per cent being so small, as compared to the public at large, it would be an unreasonable regulation, and an unreasonable burden upon the Inter-state carrier to require that it is to run its trains in such way as could not exceed six (6) miles an hour, for the sake of this small per cent of the careless public.

The ceded powers to the general government, while few in number are plenary in extent. To regulate commerce among the several States was one of the ceded powers. When Congress saw fit to authorize railroads to form continuous lines through the several States for the purpose of doing an Inter-state business, every obstacle in the way of exercising this conferred authority

was, thereby, legally removed; the State was powerless to prevent a foreign railroad train from entering its borders; the power it once had as to a train had been given up to the general government. If it could not prevent a train from entering its borders, it could no more regulate the train after entering them.

So far as Inter-state commerce was concerned, and the instrumentalities thereof, State lines were wiped out; the strong arm of the Federal government extended to all points therein, protecting its creatures, that is, the instrumentalities of Inter-state commerce from interference with the free exercise of the authority conferred.

When the Southern Railway, by virtue of this Act of Congress started its train through Ga., no State line was recognized by the general government, and a train had the same right to run in Ga., regardless of the Statute as it did to run in a State without such Statute.

VI.

THE REASONS WHY THE STATUTE IS VOID.

1. There is no common law duty on the carrier to check his train at a crossing to the extent of stopping if any person or thing shall be on the crossing, and there is no reserve power in the State to impose such burden on the Inter-state carrier. The Act under review is statutory and contravenes the common law.

2. The Act as applied to Inter-state trains, is unreasonable. It was said in the case of L. S. & M. S. Ry. Co. vs. State of Ohio, 173 U. S. 301. "The reasonableness or unreasonableness of a State enactment in a given case, will determine whether or not the same is the proper exercise of police power." It is apparent from the brief, that a train observing the Statute under review, would be reduced to six (6) miles an hour; yet if one State enact such a regulation, so could all and the effect would be to reduce fast trains, competing with each other, to a gait equal to the stagecoach of our ancestors. It is easy to see how an Inter-state railroad would be hampered in competing with a rival road, one going through Ga., and the other not. The roads of equal length could not carry passengers in the same time if one had to linger for a hundred miles through Ga., at the rate of six (6) miles an hour, while its competitor was running fifty (50) miles or more. The Act, therefore not only regulates the instrumentalities of commerce when in Georgia, but regulates the same in its whole trip and in procuring business and passengers. It is, therefore, an unreasonable regulation and void.

3. The Act in effect is to regulate Inter state commerce, and the instrumentalities thereof; whereas, the same can only be done by Congress. In the case of Brown vs. Houston, 114 U. S. 622, it is said: "So long as Congress does not pass any law to regulate commerce among the several states, it thereby indicates its own will that such commerce shall be free and un-

trammelled and any regulation of the subject by the state is repugnant to such freedom."

4. The effect of the Statute under review, is to *burden*, *impede*, and to *impair*, the usefulness of the facilities of Inter-state commerce for such traffic. In the case of the Ill. Cent. R. R., 164 U. S., cited on the brief, the rule is announced that if a Statute had the effect to do either one; that is to say, if it was a burden upon, or had the effect to *impede*, or had the effect to *impair* the usefulness of the facilities of an Inter-state carrier, such Act would be void.

5. The Statute is not observed. The Criminal Court of Georgia makes it a misdemeanor for an engineer to fail to observe this Statute, and yet, it is violated thousands of times every day in the year, and no prosecution, unless some one is injured. The public recognizes that it is a law which cannot be observed. Surely a Statute so uniformly recognized as obselete, should not be held valid. The Statute was passed before the days of Inter-state railroads; indeed, it was passed at a time when there were but few railroads of any kind, and before they ran even on a schedule. The Act violates no provision of the State Constitution, but it was recognized by the Supreme Court of Ga., more than once as obselete. When the Act was passed, railroad trains made their trips like stage-coaches; the State regulated their action at crossings which, at the time, was little burden. A train running eight (8) or ten (10) miles an hour, by

schedule, could observe that Statute with little inconvenience. Business interests, competition, and rapid transit, have all developed in the State, but the Statute did not evolve with it. Inter-state commerce made its appearance, which was neither contemplated nor provided for, when the Statute was passed. While the State has not seen fit to abolish the Act by the legislature, the great public has abolished it by its demand upon the railroads, and the railroads, in turn, have ignored it in compliance with that demand. It now only serves the purpose of enabling the careless to recover, in alleging its violation as an act of negligence.

VII.

THE QUESTION PASSED ON IN GEORGIA.

The question made has never been passed on by the Supreme Court of Ga., until recently, in the case of the So. Ry. Co. vs. Grizzle; that decision is a head-note decision, reported 131 Ga., 287, and is copied in the brief in this case. It will be observed the decision is predicated upon that of Hennington vs. State, 163 U. S., 299. The Hennington case, at best, is of doubtful soundness. Mr. Justice Brewer took no part in the decision; the Chief Justice and Mr. Justice White dissented. The decision has since been criticised by Mr. Justice Shiras, in the L. S. & M. S. R. R. vs. the State of Ohio, 173 U. S., 309. The Hennington case, I think, in effect,

has been over-ruled by the more recent cases, and especially the Miss. Commission case, and the N. C. Commission case cited on brief.

Granting, however, that the Hennington case is sound, it is still not authority for upholding the Statute under review; the difference between requiring the freight trains to stop at eight (8) o'clock Sunday morning and remain still until twelve o'clock that night, which was the statutory requirement being considered in the Hennington case, and requiring *all* trains to stop at *every* crossing *every* day, is marked. Apply the rule of reasonableness, to the two Statutes, and it might be said that it was a reasonable regulation, for the State to require freight trains to suspend operation a part of the day on Sunday, and yet it would be unreasonable to require every train, both freight and passenger, to practically run six (6) miles an hour at all times, and everywhere.

The question was never passed on by the Supreme Court of Ga. until after the case at Bar had been tried in the Court below. That decision, however, is not controlling on this Court; the construction of the Statute, by the Supreme Court of Ga. is binding, but whether or not the Statute, as construed, constitutes a burden upon Inter-state commerce is a question that this Court will decide for itself. 118 U. S. 356.

That the Statute under considerstion is a burden has been recognized by the Supreme Court of Ga., in the

case of Central R. R. Co., vs. Hall, 109 Ga. page 69, when the Chief Justice delivering the opinion says: "We agree with the learned counsel that this law which requires trains to check and keep checking when approaching a crossing is a hard one, and that it is impossible for the railroads of the country to transact the business of the country and obey it. It was passed about fifty (50) years ago, before the people appreciated the necessity of rapid transit in travel and in freight. If the law was duly obeyed by the locomotive engineers, I am informed that it would take twelve (12) hours or more to run a passenger train from Atlanta to Macon, a distance of about one hundred (100) miles. Still it is the law of the land and the Courts must enforce it, however hard it may work upon the business interests of the country, if it should be observed, or upon the railroads when they violate it."

The Chief Justice of Ga. using this language was dealing with the Statute as applied to the Intra-State road. They furnish however the judicial information that the Statute, itself, violates the commerce clause of the Federal constitution. The Statute and this decision, giving the effect of it, furnished the evidence that the Statute is a burden upon Inter-state commerce.

An Inter-state carrier must either obey the Statute and thus be unable to do the business of an Inter-state carrier, as was alleged in the amended answer and admitted by the demurrer, or it must do the business in violation of of the Statute, and be held responsible for any injury that may result. When Congress authorized the So. Ry. Co. to do an Inter-state business, and to compete with other Inter-state carriers, surely it did not contemplate that it should take either horn of such a

dilemma as this. It contemplated, rather, that such a barrier would be removed by the Courts, if the same should get in the way.

VIII.

ADJUDICATED CASES.

The Statute under consideration is peculiar to Ga. I have found nothing like it any where else, nor have I ever been able to find an authority dealing directly with the question made. In a number of States, Acts have been passed with reference to railroad crossings. In Conn. (Conn. Statute, Section 3489) authority is given on proper case made, to require a grade crossing removed at the joint expense of the railroad and County. This was held a reasonable exercise of the police power of a State, in the case of the town of Westbrook, Conn. (57 Conn. report 95.)

The State of Iowa Statute, Par. 2072, requires all trains to have their engines blow their whistles sixty (60) rods before reaching a crossing and to ring a bell until the crossing is passed, except in the city, where they are required only to ring the bell. The State of Mass., (Revised Laws, Chapter III, Par. 188,) provides for the ringing of a bell and blowing the whistle of engines approaching a crossing. The State of Penn., in 1871, passed an Act, in effect prohibiting grade crossings under certain conditions. This Act was upheld, in the case of Penn. R. R. Co. vs. Braddock Electric Railroad Co., 152 Penn. State, 116.

In the case of Toledo etc. Railroad Co. vs. Jockinson, 67 Ill., 37, the Supreme Court of the State of Ill. held that the Statute of Ill. requiring railroads to keep a flagman by day and a red light by night, at crossings, was an unreasonable burden upon Inter-state commerce and should be held unconstitutional. A number of other Statutes are found requiring railroads to signal their approach to crossings, but none requiring a train to check. A number of cases are found prescribing the duty of a railroad train going through a thickly populated community, to run at such speed as to be safe to travelers, and, in conformity with City ordinances, limiting the speed to a given number of miles an hour, which have been held reasonable on account of the populous condition of the city.

Mr. Elliott, in his work on Railroads, Vol. 2, Par. 668, uses this language: "The authorities are agreed that when the trains move upon, or across, highways their speed may be regulated, but there is a contrariety of opinion as to whether the speed of trains operating exclusively upon the private property of the company can be limited."

He cites as authority to support this text a number of State cases, but so far as I have been able to find they have all dealt with intra-railroads and the question at bar was not involved. A kindred question and the principle has been before the U. S. Supreme Court several times.

In the case of Ill. Central R. R. Co. vs. Ill., 163 U. S., page 154, it was held that an act of the State of Ill.,

requiring all trains to stop at the town of Cairo was an unreasonable exercise of police power of the State as applied to Inter-state railroads.

In the case of Gladstone vs. Minnesota; 166 U. S., page 431, it was held that the doctrine announced in the 163d U. S., above quoted was not applicable because the road in question was an Intra-state railroad.

In the case of Lake Shore & Michigan Southern Ry. Co. vs. State of Ohio, reported in the 173d U. S., page 285, it was held that a Statute requiring three trains each way to stop at each town of 3,000 inhabitants daily was a reasonable exercise of the police power. I call attention of the Court to the dissenting opinion of Mr. Justice Shiras found on page 309 of the report, which goes into the authorities pertaining to the case; and likewise the opinion of Justice Brewer, White, and Peckham concurring in this dissenting opinion contained on page 335.

The case of Cleveland, Chicago, Cincinnati & St. L. R. R. Co., reported in 177 U. S., page 514, the head note is as follows:

"The requirement that all regular passenger trains must stop at County seats, which is made by the Illinois Act of March 21, 1874, constitutes a direct burden upon Inter-state commerce in violation of the U. S. Constitution, so far, at least, as that Statute requires through Inter-state passenger trains to stop at such station when adequate train service has been provided for local traffic."

This case takes up a number of cases cited. It quotes from Mr. Justice Gray, as follows:

"The State may doubtless compel the railroad com-

pany to perform the duty imposed by its charter of carrying passengers and goods between its termini within the State. But so long, at least, as that duty is adequately performed by the company, the State cannot, under the guise of compelling its performance, interfere with the performance of paramount duties to which the company has been subjected by the Constitution and laws of the United States."

This case further calls attention to the fact that that of Gladson vs. Minnesota, above cited, is upheld upon the ground that it was dealing with an Intra-State railroad.

It further calls attention to the fact that the case above cited in the 173 U. S., page 285, can be upheld upon the grounds that it only applies to three trains running each way each day and leaves a loophole for through trains.

Mr. Justice Brown, in delivering the opinion of the Court in 177 U. S., above cited, uses this language:

"It is evident that the power attempted to be exercised under this Statute would operate as a serious restriction upon the speed of trains engaged in Inter-state traffic, and might, in some cases, render it impossible for trunk lines running through the State of Illinois to compete with other lines running through States in which no such restrictions were applied. If such passenger trains may be compelled to stop at County seats, it is difficult to see why the legislature may not compel them to stop at every station,—a requirement which would be practically destructive to through travel, where there were competing lines unhampered by such regulations. While as we held in the Lake Shore case, railways are bound to provide primarily and adequately for the accommodation of those to whom they are directly tributary, and who not only have granted to them their franchise, but who may have contributed largely to the construc-

tion of the road, they are bound to do no more than this, and may then provide special facilities for the accommodation of through traffic. We are not obliged to shut our eyes to the fact that competition among railways for through passenger traffic has become very spirited, and we think they have a right to demand that they shall not be unnecessarily hampered in their efforts to obtain a share of such traffic. It is evident, however, that neither the greater safety of their tracks, the superior comfort of their coaches or sleeping berths, nor the excellency of their tables, would insure them such share if they were unable to compete with their rivals in the matter of time. The great efforts of modern engineering have been directed to combining safety with the greatest possible speed in transportation, both by land and water. The public demand this, the railway and steamship companies are anxious in their own interest to furnish it, and local legislation ought not to stand in in the way of it." "While the Statute in question is operative only in the State of Illinois, it is obnoxious to the criticism made of the Louisiana Statute, in Hall vs. DeCuir, 95 U. S., 485, that 'while it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct, to some extent, in the management of his business throughout his entire voyage. If each State were at liberty to regulate the *conduct* of *carriers* while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight regardless of the interest of others."

The principle above announced with reference to the Statute requiring each train to stop at each county seat would doubly apply to a Statute that required each train to stop at each public crossing. If stopping once in each county, many miles apart, is a burden, what is to be said

of a Statute requiring the train to stop once each mile?

Applying this rule to the evidence in the case and it seems there can be no doubt of the effect of the Statute. As stated, for the purpose of the demurrer it was admitted that the railroad could not carry on its business in consequence of the necessary delay, if required, to comply with this Statute.

Another view of the operation and effect of the Statute is worthy of consideration. The Statute was enacted in 1852, at a time when there were no Inter-state railroads and very few others in Georgia. There is not a road in the State which attempts to comply with the Statute. While the act provides that the engineer who fails to observe the same is guilty of a misdemeanor, no engineer has ever been prosecuted for such violation, except where some special damage case rendered it necessary. It is a Statute therefore enacted at a time when Inter-state railroad companies did not exist. It is recognized by the railroads themselves as inoperative. The public demands a speed that cannot be obtained and observe this Statute. The public fail and refuse to prosecute the engineer violating the Statutes hundreds of times every day, because doubtless they realize its hardship. Such a Statute when it is apparent that if enforced it would break up Inter-state railroad business; that it would prevent the mails from being carried, and render it impossible for an Inter-state road to comply with the requirements of the Inter-state railroad commission, as well as the State Commissions, the same should be declared void.

As was said by the learned Judge, who delivered the opinion in this case in the Circuit Court of Appeals:

"The question of the validity of the State Statutes and orders of State railroad Commissions directing the stoppage of through Inter-state trains have frequently, within late years, been before the Supreme Court of the United States. One of the recent cases is that of Mississippi Railroad Commission vs. Illinois Central 203 U. S. 335, and Atlantic Coast Line Railroad vs. North Carolina Commission, 206 U. S. 1. The late declaration by the Supreme Court is found in the opinion rendered Dec. 9, 1907 in Atlantic Coast Line Railroad vs. South Carolina Commission, in which Mr. Justice Peckham speaking for that tribunal uses the following language:

" 'That any exercise of State authority in whatever form manifested, which directly regulates Inter-state commerce is repugnant to the commerce clause of the Constitution, is obvious. It hence arises that any command of a State, whether made directly or through the instrumentality of a railroad commission, which orders, or the necessary effect of which is to order, the stopping of an Inter-state train at a named station or stations, if it directiy regulates Inter-state commerce, is void.' "

The case of Gladson vs. Minnesota, 166 U. S. page 430, upon which the Court below rests, its decision was dealing with an Intra-state railroad, and the question decided in that case, I respectfully submit, so far from being authority against my contention, is in support of it. In that case the railroad in question was chartered by the State of Minnesota; it had its franchise from that State. While it connected with other roads, it was doing purely an Intra-state business. It was amenable to the power that created it. It took its fran-

chise with a burden of obeying the conditions upon which it was created. In the case at Bar the Southern Railway Company was a foreign corporation, chartered by the State of Virginia, and was operating in Georgia by virtue of the authority of an Act of Congress. While it is amenable to the laws of Georgia, the State cannot impose a burden, or in any way impede its usefulness as a means of Inter-state traffic.

In the Minnesota case, stated above, the railroad was chartered by that State. In the case at Bar, the railroad is chartered by another State.

In the Minnesota case the Railroad in question was doing purely an Intra-state business. In the case at Bar the railroad in question was doing principally an Inter-state business.

In the Minnesota case the railroad operated by the authority of that State alone. In the case at Bar the Southern Railway operated by the authority of the Federal Congress.

The idea that a State may regulate its own creature, and the reason therefor is recognized by the learned Justice delivering the opinion in the Minnesota case, where he says, on page 431, "The Legislature of the State may well treat it as one important object of establishing a railroad within the State that public officers, parties to action, jurors, witnesses and citizens generally should be enabled the more promptly to reach and leave the centers to which their duties or business may call them, to require every regular passenger train running wholly within the limits of the State to stop at all stations, at County seats directly in its course for a few

minutes and at a trifling expense, in order to take on and discharge passengers with safety, is a reasonable exercise of the police power of the State, and cannot be construed a taking of property of the company without due process of law, nor an unconstitutional interference with Inter-state commerce, or with the transportation of the mails of the United States.

The case further goes on and distinguishes it from that of the Illinois Central R. R. Co., 163 U. S. 142, by calling attention to the fact that in the latter case, was where a train was running "carrying Inter-state passengers and the U. S. Mails from Chicago in the State of Illinois, to places in other States South of the Ohio River, from an Inter-state highway, established by authority of Congress," etc.

Thus recognizing the difference between the application of the relation to an Intra-state Railroad, operating by the authority of the State, and an Inter-state Railroad, operating by the authority of Congress.

This Court, in the case of Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., 177 U. S., on page 519, in dealing with the case of Gladson vs. Minnesota recognizes the distinction that I have endeavored to point out between that and this, and in this case distinguishes the Gladson case from the one being considered as to leave it of no weight as authority.

The case of Cleveland vs. Ry. Co. 177 United States, being considered, was where a Statute of Illinois, dated March 21, 1874, requiring that all regular passenger trains must stop at County seats, was held to be a direct burden upon Inter-state commerce, and therefore void.

On page 514 this language is used: "The requirement that all regular passenger trains must stop at County seats, which is made by the Illinois Act of March 21, 1874, constitutes a direct burden upon Inter-state commerce, in violation of the United States Constitution, so far at least as that Statute requires through Inter-state passenger trains to stop at such stations, when adequate train service has been provided for local traffic."

The case clearly draws the distinction; it is dealing with a Statute requiring a train to stop at the county seat. The Gladson case, above cited, is likewise dealing with the same character of Statute in Minnesota. In this case the Statute is held a burden upon Inter-state commerce. In the Gladson case the Statute is upheld. The reason they are both upheld can only be that the one was an Intra-state train being controlled, and the other an Inter-state.

EFFECT OF STATUTE.

In the case of Morgan Steamship Company, 118 U. S. Page 455, it is said: "In all cases of this kind it has been repeatedly held that when the question is raised whether the State Statute is a just exercise of State power, or is intended by roundabout means to invade the domain of Federal authority, this court will look into the operation and effect of the Statute to discern its purpose."

Applying this rule to the evidence in the case and it seems there can be no doubt of the effect of the Statute. As stated, for the purpose of the demurrer, it was admit-

ted that the railroad could not carry on its business in consequence of the necessary delay, if required, to comply with this Statute.

Another view of the operation and effect of the Statute is worthy of consideration. The Statute was enacted in 1852, at a time when there were no Inter-state railroads and very few others in Georgia. There is not a road in the State which attempts to comply with the Statute.

It is a Statute therefore enacted at a time when Inter-state railroad companies did not exist. It is recognized by the railroads themselves as inoperative. The public demands a speed that cannot be obtained and observe this Statute. The public fail and refuse to prosecute the engineer violating the Statutes hundreds of times every day, because doubtless they realize its hardship. Such a Statute when it is apparent that if enforced it would break up Inter-state railroad business; that it would prevent the mails from being carried, and render it impossible for an Inter-state road to comply with the requirements of the Inter-state railroad commission as well as the State Commissions the same should be declared void.

The Statute viewed from any stand-point is manifestly a burden upon Inter-state commerce. The railroads must pay the penalty of violating the Statute, or the Courts must relieve them from the burden. The Statute is a burden, and being such, this Court, under its

often repeated rulings that such a Statute cannot exist, will declare this one void.

Respectfully submitted,

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McDANIEL, ALSTON & BLACK,

Of Counsel.

United States Supreme Court

OCTOBER TERM, 1909

No. 144

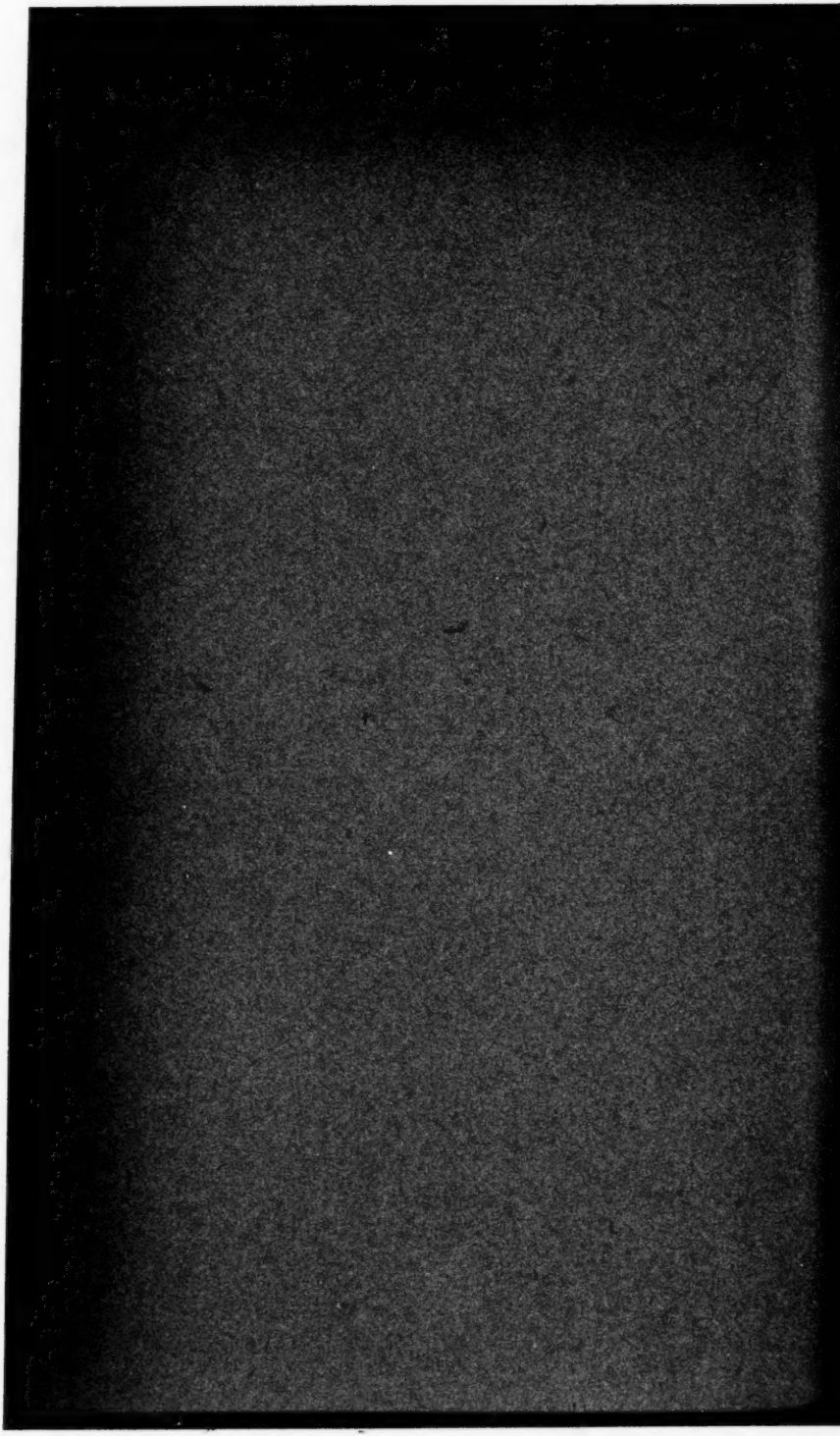
SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR

v.

INEZ KING, by next friend,
Josephine King,
Defendant in Error

BRIEF FOR DEFENDANT IN ERROR

REUBEN R. ARNOLD,
Attorney for Defendant in Error



IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM 1909.
No. 141.

Southern Railway Company,
Plaintiff in Error,
vs.
INEZ KING, by next friend.
Josephine King,
Defendant in Error.

Certiorari to the
Circuit Court of Appeals of the United
States,
For the Fifth Circuit.

BRIEF FOR DEFENDANT IN ERROR.

Constitutional Questions Not Properly Made.

Plaintiff in error has not made its alleged constitutional question in a way which this Court can consider. The question sought to be made is that the Georgia blow-post law requiring railroad trains at grade crossings to blow the whistle and check in a certain manner, is an illegal attempt to regulate commerce between the States, in that it seriously obstructs the schedules of interstate trains.

The plea in vague terms, after setting forth the Commerce Clause of the Constitution, alleged "that the statute is a direct burden on and impedes the interstate traffic being done by this defendant, and impairs the usefulness of its facilities for such traffic."

Such general language as the amended answer contains fails to set out how compliance with this law interferes with interstate commerce, and fails to show how many such public grade crossings there were in the territory covered by this train; and this pleading is entirely consistent with the proposition that the grade crossing in question was the only public crossing in the territory named: and the answer fails to set forth how long a train will be delayed by checking up for these crossings and gives no data whatsoever which will enable the Court to determine whether the delay is serious or trifling.

The Court is not bound by the mere conclusion of the pleader that the statute is a burden on interstate commerce. The railway company claims that under a certain state of facts which exist on this particular railway, compliance with this blow-post law is an unreasonable burden on interstate commerce. Ought not the facts which sustain this claim be so explicitly pleaded as to enable the Court to determine for itself whether compliance with this law is an unreasonable burden? See Parham & Co. vs. Potts-Thompson Liquor Co., 127 Georgia, 303; Newkirk vs. Southern Railway Co., 120 Georgia, 1048.

After the foregoing plea was stricken, it was not competent for the railway company to offer evidence tending to show that compliance with this law was an unnecessary burden on interstate commerce. Aside from the fact that the facts proposed to be proved were vague and indefinite, there was no pleading in the Record which justified the proof, and under the law of Georgia, pleadings must be in writing. See the decision of the Circuit Court of Appeals in the case at bar, holding that the striking of the amended answer rendered inadmissible this evidence; and see also the Georgia Code of 1895, Sections 4960 and 5049.

But in case the Court should consider the questions upon their merits, we will now discuss them.

INCIDENTAL EFFECT ON INTERSTATE COMMERCE DOES NOT VITIATE STATE LEGISLATION.

In Sherlock vs. Alling, 93 U. S., 99, the Court says:

"In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating upon all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution."

See also the case of Chicago, etc. R. R. vs. Solan, 169 U. S. 133, in which the Court uses the expression that police regulations by the States designed to protect persons and property in the management and operation of railroads "are rather to be regarded as legislation in aid of such commerce."

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DECISIONS RELIED ON BY PLAINTIFF IN ERROR NOT IN POINT.

Decisions in cases which deal with State legislation directly seeking to control interstate commerce are not in point here. The legislation in the case at bar is an aid to interstate commerce, not an obstruction. The decisions in the cases of Atlantic, etc. R. R. vs. Wharton, 207 U. S., 334; Mississippi Railroad Commission vs. Illinois Central R. R. Co., 203 U. S., 335; Cleveland, etc. R. R. vs. Illinois, 177 U. S., 514; and Illinois vs. Illinois, etc. R. R. Co., 163 U. S., 141, are all cases in which an attempt was made by State legislation to stop interstate trains at designated stations where the railroad had already provided reasonable local facilities, and such effort to stop through trains was held to be a direct attempt to regulate interstate commerce, and nothing else.

In the line of cases just cited, the attempt to stop all interstate trains at county seats or other stations was an attempt solely at the regulation of the schedules of the railroads. If those stations already had adequate service, the State's remedy was not to require through trains to stop, but to improve the service actually given to the stations sought to be aided, and it was justly held in the cases cited that such laws were mere attempts to fix arbitrary and unreasonable schedules for railroad companies. Such laws bore no relation to the public safety, health or morals, but were purely regulations of the railroads' traffic.

CASES WHICH CONTROL THE CASE AT BAR.

Cases which control the case at bar are as follows:

Smith vs. Alabama, 124 U. S., 465, which decision sustained a statute of Alabama requiring locomotive engineers to be examined and licensed.

Crutcher vs. Kentucky, 141 U. S., 47, which decision, in showing the extent to which the State can control in the exercise of its police powers, the operation of railroads, uses the following language:

"It is also within the undoubted province of the State legislature to make regulations with regard to the speed of railroad trains in

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the neighborhood of cities and towns; with regard to the precautions to be taken in regard to the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and, generally, in regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce."

Lake Shore R. R. vs. Ohio, 173 U. S., 286, in which a statute of Ohio was sustained which required every railroad company operating within the State to cause three of its regular passenger trains each way daily to stop at every village containing over three thousand inhabitants, long enough to receive and discharge passengers.

Gladson vs. Minnesota, 166 U. S., 427-430, in which a law of Minnesota requiring all trains running between points within the State, to stop at county seats, was upheld, and the Court in the course of the decision, uses the following language:

"It (the State legislature) may prescribe the location and the plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience and comfort of the passengers and of the public.

Hennington vs. Georgia, 163 U. S., 300, involved the statute of Georgia which made it unlawful to run any freight trains on Sunday, and this law was sustained as applicable to interstate trains. The effect of this law was to cause the stoppage for one-seventh of the week of all freight trains within the borders of Georgia, and it can be readily seen that the effect was much farther reaching in the way of interfering with interstate commerce than the slight checking required in the case at bar.

Erb vs. Morasch, 177 U. S., 584, involved a municipal ordinance of Kansas City, Kansas, which restricted the speed of all trains within its limits to six miles per hour, whether the same were interstate trains or interstate trains; and the objection there made that the municipal ordinance sought to and did regulate interstate commerce, was held not well founded. The Supreme Court of the United States held that

"A regulation by a city of the speed of railroad trains within the city limits is not, as to interstate trains, an unconstitutional regula-

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tion of interstate commerce,—at least until Congress takes action in the matter."

The blow-post law of Georgia, instead of obstructing commerce, makes that commerce safer and more advantageous to the public. The commerce which the United States wishes to promote is not the commerce which takes or endangers human life, but is that commerce which is conducted reasonably and which promotes the public safety, health and welfare.

PRACTICAL OPERATION OF GEORGIA STATUTE.

The blow-post law of Georgia is found in Sections 2220, 2221, 2222, 2223, 2224, 2225 and 2226 of the Georgia Code of 1895. It forms one scheme for the maintenance of public highways at grade over railroads, and for the operation of trains over the same. Section 2222, which is quoted in the Record and in the briefs in this case (and is quoted in our brief further on), requires as to all trains going over the public highway, grade crossings of the State, first: that the whistle of the locomotive be blown from a post located four hundred yards from such highway crossing until the crossing is reached; and second; that the engineer, beginning at the blow-post four hundred yards away from the crossing, must begin to check his train and keep checking it so as to stop in time should any person or thing be upon the crossing. He is not required to bring his train to a stop.

There is no complaint of the requirement that the whistle be blown.

How does the checking requirement interfere with interstate commerce? The engineer is not required to bring his train to a stop, nor does this law fix any number of miles per hour as the speed at which he shall run between the blow-post and the crossing. If the crossing is approached from a point where there is a full view on both sides of the road, then little or no checking is required of the engineer. The stopping is required only in the event that some person or thing should be upon the crossing. If the crossing is approached from a sharp curve or other point where the engineer would have no chance to protect persons or things upon the crossing until almost upon it, then necessarily much more checking would be required. It is entirely consistent with this statute that trains could run at full speed over these crossings in the great majority of instances, where the engineer could see that the way was clear.

REASONS GIVEN WHY STATE CAN REGULATE SPEED ON CROSSINGS. COMPARISONS WITH SIMILAR LAWS.

If this law worked a serious hardship upon the railroad companies, they could easily construct underground or overhead crossings in most instances, and thus reduce these grade crossings to a minimum.

Grade crossings are recognized everywhere as dangerous, and some States have abolished them altogether. See the statute of Pennsylvania, quoted in Pennsylvania R. R. vs. Braddock, 152 Penn. State, 116, and cited in brief of plaintiff in error.

If the State can abolish grade crossings altogether, can it not impose upon railroads using such dangerous places any reasonable condition before allowing their use? Does not the power to altogether prohibit include the power to regulate? Could not the State require that at every grade crossing there should be a gate and a flagman? Is the law in this case any more unreasonable than the requirement of a gate and flagman?

What difference is there in principle between a railroad track and a public highway used by pedestrians and vehicles, and a grade crossing of two railroads? The law is almost universal that every railroad must bring its trains to a complete stop before running over another railroad track crossed at grade. Surely no attack could be made upon the provisions of such a law applying to two railroads crossing at grade.

And yet there is as much danger of collisions between railroad trains and pedestrians and vehicles at highway crossings, as at crossings of two railroads.

MORE SUGGESTIONS SHOWING REASONABLENESS OF THIS LAW, AND A SUMMING UP OF THE AUTHORITIES.

This case deals only with the civil liability of the railroad for an injury on a crossing. Could not the State, as a condition of allowing railroads to run over such highway crossings, impose an absolute liability in every case for injury?

If the State can require locomotive engineers to be examined and licensed before running interstate trains, as in Smith vs. Alabama, 124 U. S., 465; if the State can require interstate trains to lie absolutely idle one day out of seven, as in Hennington vs. Georgia, 163 U. S., 299; if a municipality can regulate the speed of an interstate train to six miles per hour, as in Erb vs. Morasch, 177 U. S., 584; if the State can regulate the speed of railroad trains in the neighborhood of cities and towns, and can regulate the manner of their approach to bridges, tunnels, deep cuts and sharp curves, as in Crutcher vs. Kentucky, 141 U. S., 47,—can the State not, in the conservative exercise of its police power, protect life on the highway by requiring a reasonable amount of checking and signalling?

PUBLIC SAFETY ON GRADE CROSSINGS DEMANDS AS MUCH DILIGENCE FROM INTERSTATE AS FROM INTRA-STATE TRAINS.

An interstate train is as dangerous to life and property in running over a grade crossing as any other train. The reasons which call for this statute of Georgia apply equally as much to one class of trains as to the other.

GEORGIA CASES EXPLAINED AS TO EFFECT OF BLOW-POST LAW.

Judge Burns, in his dissenting opinion in the Circuit Court of Appeals, upon the decision of this case, quoted a remark made by Chief Justice Simmons, of Georgia, in the case of Central of Georgia Ry. Co. vs. Hall, 109 Georgia, 367, to the effect that trains could not observe literally the blow-post law and make their schedules.

Judge Simmons stands alone among the judges of Georgia in his opinion about the hardship of the blow-post law. The blow-post law has been before that tribunal in scores of cases and no other judge, so far as we can ascertain, has ever questioned its wisdom or commented upon its hardship.

In the recent case of Grizzle vs. Southern Railway Company, 131 Georgia, 287, which was the very last decision upon this subject rendered, and decided in 1908, the Supreme Court of Georgia sustained the constitutionality of this law against the attack which is now being made upon it, and held that it was no interference with interstate commerce.

In Brunswick and Western R. R. vs. Hoover, 74 Georgia, 428, Chief Justice Jackson, in alluding to this law and explaining its provisions, said:

"Not only, therefore, is it negligence, but negligence of the grossest and gravest character, not to comply with these statutory enactments to preserve human life on the public highway, when that highway crosses the railroad track; so grave that it is made criminal not to comply with these enactments."

The blow-post law was again enforced in the case of Williams vs. Southern Railway Co., 126 Georgia, 710; Central of Georgia Ry Co. vs. North, 129 Georgia, 106; and Western and Atlantic Railroad vs. York, 128 Georgia, 687.

These decisions show that the Supreme Court of Georgia has not given the remarks of Judge Simmons the effect claimed for them by counsel for plaintiff in error.

In conclusion, we say that a close inspection of the Act shows that it does not require a train to stop at a crossing, but only to check. It only requires checking so as to be able to stop in time should any person or thing be on the crossing. In the great majority of instances, the blowing of the whistle will keep the public crossing clear of persons, and no checking whatever will usually be required. In other words, this law makes the checking, and its extent, depend upon the circumstances of danger attending the case.

ARGUMENT FOR DEFENDANT IN ERROR.

Constitutional Questions Not Properly Made.

It is doubtful whether the plaintiff in error has made its questions in such a way that this court can consider them.

The question which the defendant is attempting to have decided is whether the Georgia statute contained in Section 2222 of the Georgia Code of 1895 is void as imposing an unauthorized State burden on interstate commerce.

This law is applicable to railroad companies and reads as follows:

"There must be fixed on the line of said roads, and at the distance of four hundred yards from the center of each of such road crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road."

The road crossings which are referred to in this statute mean public, grade crossings on all the public roads of the State.

The road in the case at bar was of that description; and not only so, but the railroad company in this case has recognized the blow-post law and acquiesced in it by erecting blow-posts, as this law requires, on each side of the crossing in question.

The defendant, by a plea which appears in the record, undertakes to set up in general, in vague terms, some supposed interference of the blow-post law with interstate commerce. The material portions of the amended answer setting up this contention are as follows:

(After first setting up that the train which caused the injury was engaged in interstate commerce.) "Defendant further shows that the statute of Georgia, which is in these words, to-wit: (Here citing the blow-post law which we have heretofore quoted), the violation of which plaintiff alleges as the negligence in this case, is and was inoperative as to defendant's train, which plaintiff alleges injured her, for the reason that it is in violation of Section 8, Article First, of the Constitution of the United States, which gives to Congress the right to 'regulate commerce with foreign nations, and among the several States

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and with the Indian tribes.' Your defendant further shows that the statute of Georgia is not a reasonable regulation of the police power of the State to secure the safety of persons, but that the statute is a direct burden on and impedes the interstate traffic being done by this defendant, and impairs the usefulness of its facilities for such traffic. Defendant further shows that it is impossible to observe said statute and carry the mails as defendant is required to carry them under the contract it has with the government; and it is likewise impossible to do an interstate business, and at the same time comply with the terms of said statute.

"Wherefore, it says that said statute is inoperative as to it, and it should not be required to comply with the same on its interstate line of railroad."

This attack upon the constitutionality of the blow-post law is vague and indefinite in the following particulars:

It fails to set out how a compliance with this law interferes with interstate commerce.

It fails to allege how many public crossings there are in the path of this train between the South Carolina line and Atlanta.

It is entirely consistent with this pleading that the public crossing in question was the only public crossing in the territory named.

It fails to set forth just how long a train will be delayed by undertaking to check up for each of these crossings; it gives no data whatsoever which will enable the Court to determine whether the delay caused to a train by a compliance with this law is serious or trifling.

The Court is not bound by a conclusion of a pleader that the statute is a burden on interstate commerce. The rule in pleading here is analogous to the pleading in cases of fraud. A general charge of fraud in a pleading always counts for nothing; the particulars constituting the fraud must be set forth.

It will be borne in mind that the plaintiff in error here is claiming that a certain state of facts makes compliance with this blow-post law a burden on commerce. Should not the state of facts be so clearly and explicitly pleaded as to enable the Court to determine for itself whether an unreasonable burden is imposed on interstate commerce?

In Parham & Co. vs. Potts-Thompson Liquor Co., 127 Georgia, 303, the rule is thus stated:

"An averment in a pleading, that a named statute is 'unconstitu-

tional and void," is too vague and indefinite to raise any question for determination." See also a similar ruling in Newkirk vs. Southern Railway Company, 120 Georgia, 1048.

It would not seem to cure the objection that the particular clause of the Federal Constitution which is claimed to be violated is specified; it should be shown how and wherein the State law operates to violate this clause of the Federal Constitution, especially if the violation depends upon a certain condition or state of facts, as is claimed in this case.

After this plea was stricken, plaintiff in error offered in evidence the testimony of the witness Dewberry, and counsel for plaintiff in error, upon objection being made to Dewberry's evidence, proposed to prove by Dewberry the following facts:

"I expect to prove that between the South Carolina line and Atlanta, there are practically one hundred road crossings, or between eighty-five and one hundred public road crossings; that the distance is one hundred and one miles; that the crossings in some localities are very close together, and within a few hundred yards of each other, and at others further apart, but on the average making a crossing to the mile almost. We expect to show further, that to observe the statute and check and keep checking so as to have a train under control, and to stop should any person or thing be on the crossing, it would consume from five to ten minutes for each crossing, dependent, of course, upon the weight and length of the train, and the grade; but it would make an average of seven or eight minutes. We wish to show that this train was made up and known as No. 39, the vestibule train which runs from the City of Washington, though the States of Virginia, North Carolina, South Carolina and Georgia; that it was carrying passengers from one State to another, also carrying an express car with freight on it, from one State to another. We wish and expect to show that obedience to that Crossing Act would hinder, and practically prevent interstate business being done by the defendant railroad. We wish to show the condition I have just stated all existed at the time this accident occurred, on the 11th of Ocober, 1903."

Outside of the fact that there was no pleading to justify this proposed proof, we say that it was too uncertain and indefinite to be the basis of a legal exception. The counsel said he proposed to prove that there were between eighty-five and one hundred public crossings in this territory. He should have been exact in his offer. He said that he expected to show on the average of a crossing to the mile,

"almost." He should have been more exact in this. He said that he expected to show that to check and have the train under control for every crossing would consume from five to ten minutes for each crossing, dependent upon the weight and length of the train, and the grade. He should have been more exact in this.

The Circuit Court of Appeals, in the decision rendered in this case, declined to consider this offer of proof as a ground for exception, and uses the following language:

"The objection was sustained, testimony excluded and exception noted. We are of the opinion that there was no error in the action of the Court in sustaining the objection, as the testimony was not properly admissible in the absence of pleading to support it. This view seems to have obtained with counsel for defendant below, as evidenced by the amendment filed and heretofore discussed."

In Georgia, written pleadings are required. By Section 4960 of the Georgia Code of 1895, it is provided:

"All suits in the Superior Courts for legal or equitable relief, or both, shall be by petition to the Court, signed by the plaintiff or his counsel, plainly, fully, and distinctly setting forth his charge, ground of complaint and demand, and the names of the persons against whom process is prayed."

By Section 5049 of the same Code, it is provided:

"The defendant may, by proper pleadings, raise issues of law, or of fact, legal or equitable, or both. All issues of law shall be raised by demurrer. All issues of fact shall be raised by plea or answer, which may be of a dilatory nature, or to the merits."

Thus it will be seen that inasmuch as written pleadings are required, the defendant had no basis for any evidence upon this alleged constitutional objection, after its plea had been stricken.

But in case the Court should hold that the questions sought to be raised by the plaintiff in error are properly made, either in the amended answer or in the proposed evidence, we will discuss the question now upon its merits.

ARGUMENT ON MERITS.

Incidental Or Remote Effect On Interstate Commerce Does Not Vitiate State Legislation.

The Constitution of the United States gives Congress the right "to regulate commerce with foreign nations and among the several States, and with the Indian tribes." (Section 8, Article 1, Constitution of the United States.)

In Sherlock vs. Alling, 93 U. S., p. 99, the Court say:

"In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislation upon all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution."

In the case of Chicago, etc. R. R. vs. Solan, 169 U. S., p. 133, the Court say:

"The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits. Such are the grounds upon which it has been held to be within the power of the State to require the engineers and other persons engaged in the driving and management of all railroad trains passing through the State to submit to an examination by a local board as to their fitness for their position; or to prescribe the mode of heating passenger cars in such trains."

SOME PREVIOUS DECISIONS NOT IN POINT.

Decisions on State Legislation Which Directly Sought to Control Commerce, Not In Point Here. Legislation In Case at Bar, Is An Aid To Interstate Commerce.

It will be seen from the two decisions just quoted, first, that the police power of the State may be exercised, even though it may incidentally and to some extent affect interstate commerce; second, that so long as Congress has not legislated upon a particular subject, State legislation of a reasonable kind is in order and not unconstitutional; and, third, that the rightful exercise of police power by the State, even though it may incidentally affect commerce, is to be regarded as legislation in aid of such commerce.

Many cases have been decided by the Supreme Court of the United States which more than cover this case. It has been held that legislation by a State, which directly undertakes to regulate commerce, is void; while other legislation, which incidentally affects it equally as much as a direct regulation of it, has been held valid. In Atlantic, etc. R. R. vs. Wharton, 207 U. S., p. 334 the Court say:

"It hence arises that any command of a State, whether made directly or through the instrumentality of a railroad commission, which orders, or the necessary effect of which is to order, the stopping of an interstate train at a named station or stations, if it directly regulates interstate commerce, is void.

"It has been decided, however, that some orders which may cause the stoppage of interstate trains made by State authority may be valid if they do not directly regulate such commerce."

Counsel for the plaintiff in error in his brief relies almost wholly on the line of decisions of which the Wharton case, just quoted, is a specimen. In the Wharton case, the railroad commission of South Carolina required the railroad company to stop on signal two of its through fast mail interstate trains at a small station in South Carolina, which had quite a number of local trains each day, and this rule of

the commission was held to be an unreasonable burden upon interstate commerce.

The same ruling was made in the case of Mississippi Railroad Commission vs. Illinois Central R. R. Co., 203 U. S., p. 335. In the Mississippi case, the facts were practically identical with the South Carolina case.

The case of Cleveland, etc. R. R. vs. Illinois, 177 U. S., p. 514, cited by plaintiff in error, held to be invalid a statute which required all through interstate commerce trains to stop at every county seat when adequate train service had already been provided for local traffic.

The same is true of the State of Illinois vs. Illinois, etc. R. R. Co., 163 U. S., p. 141. The line of decision just quoted, holding that an attempt to make through interstate trains stop at a designated station is an unreasonable burden upon interstate commerce, is easily distinguishable from the case at bar. In the cases cited the remedy of the State was to require the railroad to give adequate train service with its other trains to the various stations at which it was sought to make the through trains stop. If the service was inadequate, it was not the proper remedy to cause the stoppage of the through trains, but to improve the service of the other trains. As the Court said in the Wharton case (cited above):

"Fault is found here with the character of some of the local trains in that the appointments thereof were not up to a sufficiently high standard. These deficiences are remediable by other means than the stoppage of the two trains in question."

To attempt to stop all through trains at county seats or other points is sheer tyranny, if those stations have already adequate service. After adequate train service is given, it can neither aid the public health, safety, morals or convenience, to require other trains to stop, and it has been justly held that such laws are mere attempts to fix arbitrary and unreasonable schedules for railroad companies. In effect, all that such laws can accomplish is to regulate interstate commerce. Such laws bear no relation to the public safety, health or morals. They are purely and simply regulations of commerce.

CASES WHICH CONTROL THE CASE AT BAR.

The case at bar belongs to an entirely different class.

In Smith vs. Alabama, 124 U. S., p. 465, the statute of Alabama requiring locomotive engineers to be examined and licensed, was held not to be a regulation of interstate commerce even as applied to railroads having interstate lines, and the ruling of the court is thus summed up in the third head-note:

"Such statute, so far as it affects transactions of commerce among the States, does so indirectly, incidentally and remotely, and not so as to burden or impede them; and in the particulars in which it touches those transactions at all, it is not in conflict with any enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence."

We may remark in this connection that Congress has not enacted any legislation which regulates the operation of interstate trains over grade crossings. It is manifestly one of those subjects in which the State is left free to enact its own laws.

In the case of Crutcher vs. Kentucky, 141 U. S., 47, the Court uses the following language, which not only in its reasoning, but in its illustrations, squarely covers the case at bar:

"But whilst it is only such things as are clearly injurious to the lives and health of the people that are placed beyond the commercial power of Congress, yet when that power or some other exclusive power of the Federal Government is not in question, the police power of the State extends to almost everything within its borders; to the suppression of nuisances; to the prohibition of manufactures deemed injurious to the public health; to prohibition of intoxicating drinks, their manufacture or sale; to the prohibition of lotteries, gambling, horse-racing or anything else that the legislature may deem opposed to the public welfare (citing authorities). It is also within the undoubted province of the State Legislature to make regulations with regard to the speed of railroad trains in the neighborhood of *cities and towns;* with regard to the precautions to be taken in regard to the approach of such trains to *bridges, tunnels, deep cuts and sharp curves,* and, generally, in regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce. Such regulations are eminently local in their character, and in the absence of congressional

regulations over the same subject, are free from all constitutional objections, and unquestionably valid."

If, as the Court says in the Crutcher case, the Legislature can regulate the speed of trains in the neighborhood of cities and towns, and can require the precautions to be taken in approaching bridges, tunnels, deep cuts and sharp curves, can it not equally regulate its speed and manner of approaching dangerous grade crossings?

In Lake Shore R. R. vs. Ohio, 173 U. S., p. 286, a statute of Ohio which required every railroad company operating within the State to cause three of its regular passenger trains each way daily to stop at every village containing over three thousand inhabitants long enough to receive and let off passengers, was held to be a valid law, and not an improper regulation of interstate commerce.

In Gladson vs. Minnesota, 166 U. S., pp. 427 and 430, a law of Minnesota requiring all trains running between points within the State to stop at county seats, was upheld, and the Court, in the body of the opinion, use this language, which is controlling in the case at bar:

"The principles of law which govern this case are familiar, and have often been affirmed by this Court. A railroad corporation created by a State is for all purposes of local government a domestic corporation, and its railroad within the State is a matter of domestic concern. Even when its road connects, as most railroads do, with railroads in other States, the State which created the corporation may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. It may prescribe the location and the plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience and comfort of the passengers and of the public. All such regulations are strictly within the police power of the State. They are not in themselves regulations of interstate commerce; and it is only when they operate as such in the circumstances of their application, and conflict with the express or presumed will of Congress exerted upon the same subject, that they can be required to give way to the paramount authority of the Constitution of the United States."

In the case of Hennington vs. Georgia, 163 U. S., p. 300, the question involved the validity of Georgia's statute, making it unlawful to run any freight train on Sunday. The effect of this statute was

absolutely to shut off all interstate trains for a period of twenty-four hours. The delay and stoppage caused by such a law was infinitely greater than the slight and incidental slowing up and checking for grade crossings; and yet this law was sustained in the Hennington case as a valid exercise of the police power of the State of Georgia, and it was held that the incidental effect upon commerce did not render the law void.

A case which covers this case absolutely is that of Erb vs. Morasch, 177 U. S., p. 584, in which the question involved was a municipal ordinance of Kansas City, Kansas, which restricted the speed of all trains within its limits to six miles per hour, whether the same were interstate or intrastate trains. The objection made is the identical one made in the case at bar, to-wit: that to cause the speed to slow down interfered with the rapid transit of interstate trains, and thus interfered with the carriage of the mails and of interstate commerce. The Supreme Court of the United States, ruled that "a regulation by a city of the speed of railroad trains within the city limits is not, as to interstate trains, an unconstitutional regulation of interstate commerce,—at least until Congress takes action in the matter."

There is not a particle of difference in principle between the case at bar and Erb vs. Morasch. To require the train to slow up for a grade crossing no more interferes with interstate commerce than to bring it down to a speed of six miles per hour in every municipality through which it might pass. If one city could pass such an ordinance, all cities could pass it. There are doubtless nearly as many villages, towns and cities in the various States as grade crossings. The principle which lies at the bottom of the decisions sustaining these laws is that they are intended to promote the public safety, and are not primarily regulations of interstate commerce, and only affect it incidentally and remotely. In other words, as the Court said in the Solan case, such regulations of the State are in aid of commerce. They make commerce safe and more advantageous to the public. The commerce which the United States wants to promote is not the commerce

which takes human life or scatters pestilence, but the commerce which is conducted reasonably, and which promotes the public safety, health and welfare. Therefore, such regulations, which save life, health and morals, aid commerce.

PRACTICAL OPERATION OF GEORGIA STATUTE.

To come now to the exact way in which the blow-post law of Georgia operates: What is known as the blow-post law of Georgia is found in Sections 2220, 2221, 2222, 2223, 2224, 2225 and 2226 of the Georgia Code of 1895. It forms one scheme for the maintenance of public highways at grade over railroads, and of the operation of trains over the same. Section 2220 requires "all railroad companies shall keep in good order at their expense public roads or private ways established pursuant to law where crossed by their several roads, and build suitable bridges and make proper excavations or embankments according to the spirit of the road laws."

Section 2221 requires that such crossings include the width of land on both sides of the road allowed by charter or appropriated by the company therefor, and for as many feet beyond, each way, as is necessary for a traveler to get on or off the cars safely and conveniently.

Section 2222 is the law in question, and we have already quoted it.

This Act was passed in 1852, long before any railroad now operating in Georgia acquired any franchise therein. The Georgia Railroad and Banking Company, and the Central Railroad and Banking Company, were then in existence, but neither are now operating under their franchises, and lessees are in posession.

Therefore, every railroad company in Georgia takes its franchise and its right to operate subject to the provision of this law, which has been sustained and applied by the Supreme Court of Georgia in many cases.

A full history of this statute will be found in Southern Railway vs. Combs, 124 Georgia, p. 1004. The cause for the passage of this law on January 22, 1852, was a shocking accident which occurred on December 14, 1851, at a grade crossing in Monroe county, in which a carriage containing a lady and four children, driven by a negro slave,

was run into by a train of the Macon and Western Railroad Company, and two of the children and the driver killed, and the other occupants seriously injured. The cases growing out of this accident were known as Railroad vs. Davis, 18 Ga., 679; Railroad vs. Wynn, 19 Ga., 440, and Railroad vs. Wynn. 26 Ga., 250.

The requirements of the Act, so far as the case at bar is concerned, are (first) that the whistle of the locomotive be blown continuously from a post located four hundred yards from the crossing until the crossing is reached, and by Section 2224, if the crossing is in an incorporated town, a continuous ringing of the bell for the same distance is substituted for the blowing of the whistle. (Second) Beginning at the blow-post four hundred yards away, the engineer must begin to check his train and keep checking so as to stop in time should any person or thing be upon the crossing. He is not required to bring his train to a stop.

Surely the requirement that the whistle be blown or the bell rung cannot interfere with interstate commerce.

How does the checking requirement interfere with interstate commerce?

The engineer is not required to bring his train to a stop, nor does the law fix any number of miles per hour as the speed at which he shall run between the blow-post and the crossing. If the crossing is approached from a point where there is a full view on both sides of the road, then little or no checking is required of the engineer. The stopping is only required in the event any person or thing should be upon the crossing. If the crossing is approached from a sharp curve where the engineer would have no chance to protect the person or vehicle upon the crossing, until almost upon it, then necessarily much more checking would be required.

It is entirely consistent with the terms of this statute, that trains can run at full speed over crossings in the great majority of instances.

REASONS GIVEN WHY STATE CAN REGULATE SPEED ON CROSSINGS. COMPARISONS WITH SIMILAR LAWS.

Is it not within the power of the State to require certain measures of diligence on the part of those operating trains when passing over dangerous places like grade crossings?

If this law worked such a hardship upon the railroads, they could easily construct underground or overhead crossings whenever practicable, and thus reduce these grade crossings to a minimum. Really, this would be best for the railroads and for the public.

To maintain these grade crossings is a most dangerous undertaking, and is so recognized everywhere, and some States have abolished grade crossings altogether. See the statute of Pennsylvania, quoted in Pennsylvania R. R., vs. Braddock, etc. R. R., 152 Penn. State, 116, and see the statute of Connecticut, quoted in the case of the town of Westbrook, 57 Conn., p. 95, both of which are cited on page 45 of brief of plaintiff in error.

If the State can abolish grade crossings altogether, can it not impose upon the railroads using such dangerous places almost any conceivable condition before allowing their use? The power to altogether prohibit certainly includes the power to regulate.

The time doubtless will come when if grade crossings are to be maintained at all, there will be gates and flagmen stationed at every crossing. Could it be doubted that a law requiring a gate or flagman would be a valid exercise of the State's police power?

Again, what is the difference in principle between a grade crossing over a railroad track upon which pedestrians and vehicles pass, and a grade crossing of two railroads? The law is almost universal that every railroad must bring its trains to a complete stop before running over another railroad track crossing at grade. Practically every State has a law requiring each company to come to a complete stop under such circumstances.

See Georgia Code of 1895, Section 2234 which provides as follows:

"Whenever the tracks of separate and independent railroads cross each other in this State, all engine drivers and conductors must cause the trains which they respectively drive and conduct to come to a full stop within fifty feet of the place of crossing, and then to move forward slowly. The train of the road first constructed and put in operation shall have the privilege of crossing first."

Would anybody attack the provisions of this law as an interference with interstate commerce? And yet it is easy to conceive of a situation where there might be such a number of these grade crossings as to interfere with the speed of trains. Such a provision is in the interest of public safety, and commerce would not be hurt, but would benefit by it.

There is no more danger of collision at a point where two railroads cross each other than where a dirt road crosses a railroad. In one case the danger is that of colliding with another train. In the other case it is that of colliding with pedestrians or vehicles of various kinds.

MORE REASONS, AND A SUMMING UP OF THE ARGUMENT.

Inasmuch as we are dealing only with the civil side of this blow-post law, would it not be competent for the State to enact that in every case where a railroad crosses a highway at grade, that the railroad shall pay all damages done to persons or property upon that crossing? The law which is the subject-matter of attack here does not itself prohibit the running of trains over these crossings in violation of law. So far as the case at bar is concerned, it merely fixes a civil liability. Laws have been sustained which absolutely make railroads liable under certain circumstances irrespective of negligence. The common law liability of the carrier of freight makes him an insurer. Nothing excuses him except the act of God or the public enemy.

It being within the power of the State to abolish grade crossings altogether, surely the State, as a condition of allowing the railroads to maintain them, can require them to submit to reasonable regulations, and one of these conditions could be the creation of a liability for injuries occurring upon such crossing.

To sum up the question: If the State can regulate the operation of interstate railroads by requiring locomotive engineers to be examined and licensed before they run, as in the Smith case from Alabama, 124 U. S., p. 465; if the State can require interstate trains to lie absolutely idle one day out of seven, as in Mennington vs. Georgia, 163 U. S., p. 299; if a municipality can regulate the speed of an interstate train to six miles per hour, as in Erb vs. Morasch, 177 U. S., p. 584; if, in the language of the Court, in Crutcher vs. Kentucky, 141 U. S., p. 47, States can pass laws

"With regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in regard to the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and generally, with regard to all operations in which the

lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce;" and if, as stated by the Court in Gladson vs. Minnesota, 166 U. S., p. 430, the State may "prescribe the location and the plan of construction of the road, the rate of speed at which the trains shall run," and if, as is admitted in the brief of counsel for plaintiff in error, the State can prohibit grade crossings altogether; if the law can require trains of railroads which cross each other at grade to come to an absolute stop,—can the State not, in the conservative exercise of its police power, protect life and property upon highway crossings at grade, by simply requiring a reasonable degree of checking and signalling?

Is it not manifest that the primary object of this law being the public safety, that if there is any effect upon interstate commerce, it is only incidental and remote? Is it not manifest that the law is designed to protect lift and property, and is not intended directly to regulate commerce in any shape, manner or form?

PUBLIC SAFETY ON GRADE CROSSINGS DEMANDS AS MUCH DILIGENCE FROM INTERSTATE AS FROM INTRASTATE TRAINS.

An interstate train or a through mail train is as dangerous in going over a public crossing as any other train. Surely, there is nothing unreasonable in the Georgia law which makes the blow-post law apply to all trains. Any train will produce death or injury in causing a collision at a grade crossing. It was for this reason that in the Erb case, hereinbefore cited, the ordinance of the Kansas town, with regard to the speed of interstate as well as intrastate trains, was upheld. If the State law is to apply to any trains at grade crossings, it must necessarily apply to all. All trains which go at high speed are dangerous. How absurd it would be to enact a law which would say that local freight or passenger trains shall observe certain requirements of care at public crossings and thus save life, and at the same time, put no requirement upon interstate or mail trains in the way of speed or signals.

BLURRE

GEORGIA CASES EXPLAINED AS TO EFFECT OF BLOW-POST LAW.

In the trial of this case in the Circuit Court of Appeals, two of the circuit judges, Judges Pardee and Shelby, presided, and District Judge Burns, of Texas, made the third judge. The two circuit judges concurred in the opinion that the statute of Georgia was a valid exercise of the police power, from which District Judge Burns dissented.

Judge Burns based his dissent mainly upon a remark of Chief Justice Simmons, of Georgia, in the case of Central of Georgia Railway vs. Hall, reported in 109 Georgia, p. 367, in which case Judge Simmons used language to the effect that trains could not observe literally this blow-post law and make their schedules.

Judge Simmons is absolutely alone in his opinion about the hardship of this law among the various judges who have served upon the Supreme Court of Georgia. The blow-post law has been before that tribunal in scores of cases, and no other judge, so far as we can ascertain, has ever questioned its wisdom or commented upon its hardship.

In the recent case of Southern Railway vs. Grizzle, 131 Georgia, p. 287 (and which is the very last decision upon the subject) the Supreme Court of Georgia sustained the constitutionality of this law against the very same attack now being made upon it, and held that it was no interference with interstate commerce. Surely, this ruling in a case in which the identical question now before the Court was involved, should have more weight than the mere remark of Judge Simmons in the Hall case, especially as Judge Simmons wound up in the Hall case with the following:

"Still, it (the blow-post law) is the law of the land, and the Courts must enforce it, however hardly it may work upon the business interests of the country if it should be observed, or upon the railroads when they violate it."

Other judges of the Supreme Court have concurred in the enforcement of this law, and thought that it was a wise one. Chief Justice Jackson, in the case of Brunswick & Western R. R. vs. Hoover, 74 Georgia, p. 428, in alluding to this law and explaining its provisions, said:

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"Not only, therefore, is it negligence, but negligence of the grossest and gravest character, not to comply with these statutory enactments to preserve human life on the public highway, when that highway crosses the railroad track; so grave that it is made criminal not to comply with these enactments."

The blow-post law was again enforced in the case of Williams vs. Southern Railway Company, 126 Georgia, p. 710; and again in the case of Central of Georgia Railway Company vs. North, 129 Georgia, p. 106, and again in Western and Atlantic Railroad vs. York, 128 Georgia, p. 687.

We will not cite further cases in which this law has been enforced. We submit that the remarks of Judge Simmons, in the Hall case, that it was impossible for the railroads to transact the business of the country and obey this law, are not warranted by a consideration of the Act itself. The Act does not require a train to stop at a crossing, but only to check. It only requires checking so as to be able to stop in time "should any person or thing be upon the crossing." Surely, common humanity would require that the train should be checked or stopped if any person or thing is upon the crossing, or in danger.

In the great majority of instances, the blowing of the whistle four hundred yards away will serve to keep persons at a safe distance from the crossing. In the great majority of instances, there are no persons on or near the crossing, and very little, if any, checking is required. In many instances, the view on either side of the railroad is not obstructed, and the engineer can readily see that it will be impossible for anything to get upon the crossing before his train passes. He is only required to have his train in a condition of checking when somebody is on or near the crossing, in a condition of danger, and should not the law protect human life under such circumstances?

Respectfully submitted,

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